# UNITED STATES REPORTS

VOLUME 445

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1979

FEBRUARY 25 THROUGH APRIL 17, 1980

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

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HENRY C. LIND

REPORTER OF DECISIONS

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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS

---

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.*

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OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

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*Mr. Justice Reed, who retired effective February 25, 1957 (352 U. S. XIII), died April 2, 1980. See *post*, p. v.

## SUPREME COURT OF THE UNITED STATES

### ALLOTMENT OF JUSTICES

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

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(For next previous allotment, see 404 U. S., p. v.)

## DEATH OF MR. JUSTICE REED

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 14, 1980

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Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS.

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THE CHIEF JUSTICE said:

Before we proceed today with the regular business of the Court, it is our sad duty to take note of the death of our beloved colleague and friend Mr. Justice Stanley Reed.

He served as a Justice of this Court from 1938 to 1957, after having served as Solicitor General of the United States from 1935 to 1938.

His death came almost 22 years after retiring from this Court, but retirement for Mr. Justice Reed was not the end, but a continuation of his judicial career.

At his own request, he was assigned to sit on United States Courts of Appeals throughout the United States, and particularly on the United States Court of Appeals for the District of Columbia Circuit. I shared the pleasant and valuable experience of sitting with him on many cases on that Court, so I found firsthand what his colleagues of this Court knew: that Mr. Justice Reed was a thoughtful, painstaking, able jurist, dedicated to the American system and the Constitution. His 19 years in this Court spanned one of the most stirring periods of the country's history and the Court's history. But whether in agreement or dissent in cases of great importance, Mr. Justice Reed was the epitome of civility.

His career as lawyer in government was unusual, to say the least. He was successively General Counsel of the Federal Farm Board, General Counsel of the Reconstruction Finance Corporation, and Solicitor General of the United States before his appointment to this Court by President Roosevelt. He lived a rich and full life in every respect.

I speak for all the Members of this Court in expressing our profound sympathy to Mrs. Reed and to her family, the two sons of Mr. Justice Reed and Mrs. Reed.

On an appropriate occasion after the opening of the next Term of this Court in October, the official memorial service of the Bar will be conducted for Mr. Justice Reed in this Chamber.

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

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## WHIRLPOOL CORP. *v.* MARSHALL, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-1870. Argued January 9, 1980—Decided February 26, 1980

Section 11 (c)(1) of the Occupational Safety and Health Act of 1970 (Act) prohibits an employer from discharging or discriminating against any employee who exercises "any right afforded by" the Act. Respondent Secretary of Labor promulgated a regulation providing that, among other rights protected by the Act, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available. Claiming that a suspended wire-mesh screen in petitioner's manufacturing plant used to protect employees from objects occasionally falling from an overhead conveyor was unsafe, two employees of petitioner refused to comply with their foreman's order to perform their usual maintenance duties on the screen. They were then ordered to punch out without working or being paid for the remainder of their shift, and subsequently received written reprimands, which were placed in their employment files. Thereafter, respondent brought suit in Federal District Court, alleging that petitioner's actions against the two employees constituted discrimination in violation of § 11 (c)(1) of the Act, and seeking injunctive and other relief. While finding that the implementing regulation justified the employees' refusals to obey their foreman's order, the District Court

nevertheless denied relief, holding that the regulation was inconsistent with the Act and therefore invalid. The Court of Appeals reversed and remanded, agreeing that the employees' actions were justified under the regulation but disagreeing with the conclusion that the regulation was invalid.

*Held:* The regulation in question was promulgated by respondent in the valid exercise of his authority under the Act, and constitutes a permissible gloss on the Act, in light of the Act's language, structure, and legislative history. Pp. 8–22.

(a) The regulation clearly conforms to the Act's fundamental objective of preventing occupational deaths and serious injuries. Moreover, the regulation is an appropriate aid to the full effectuation of the Act's "general duty" clause, which requires an employer to furnish to each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious injury to the employees. The regulation thus on its face appears to further the Act's overriding purpose and rationally complements its remedial scheme. Pp. 11–13.

(b) The facts that Congress, at the time it was considering passage of the Act, rejected a so-called "strike with pay" provision (whereby an obligation would be imposed on employers to continue to pay employees who absented themselves from work for reasons of safety), and also rejected a provision that would have given the Labor Department, in imminent-danger situations, the power temporarily to shut down all or part of an employer's plant, do not indicate a congressional intent incompatible with an administrative interpretation of the Act such as is embodied in the regulation at issue. In contrast to the "strike with pay" provision, the regulation does not require employers to pay workers who refuse to perform assigned tasks in face of imminent danger, but simply provides that in such case the employer may not "discriminate" against the employees involved. And in contrast to the "shutdown" provision, the regulation accords no authority to Government officials but simply permits private employees to avoid workplace conditions that they believe pose grave dangers to their own safety and does not empower such employees to order their employers to correct the hazardous condition. Pp. 13–21.

593 F. 2d 715, affirmed.

STEWART, J., delivered the opinion for a unanimous Court.

***Robert E. Mann*** **argued the cause for petitioner. With**

him on the briefs were *Ronald J. Hein, Jr.*, and *Mark A. Lies II*.

*Solicitor General McCree* argued the cause for respondent. With him on the brief were *Deputy Solicitor General Geller, Edwin S. Kneedler, Benjamin W. Mintz*, and *Dennis K. Kade*.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The Occupational Safety and Health Act of 1970 (Act) [1] prohibits an employer from discharging or discriminating against any employee who exercises "any right afforded by" the Act.[2] The Secretary of Labor (Secretary) has promulgated a regulation providing that, among the rights that the Act so protects, is the right of an employee to choose not to perform his assigned task because of a reasonable appre-

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**Robert T. Thompson, Stephen A. Bokat*, and *Stanley T. Kaleczyc* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Warren Spannaus*, Attorney General, and *Steven M. Gunn* and *Sharon L'Herault*, Special Assistant Attorneys General, for the State of Minnesota; by *J. Albert Woll, Elliott Bredhoff, John Fillion, George H. Cohen, Robert M. Weinberg, Laurence Gold*, and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations et al.; and by *Michael Churchill* for the Philadelphia Area Project on Occupational Safety and Health.

*Jeffrey B. Schwartz* filed a brief for the American Public Health Association as *amicus curiae*.

[1] 84 Stat. 1590, as amended, 92 Stat. 183, 29 U. S. C. § 651 *et seq.* (1976 ed. and Supp. II).

[2] Section 11 (c)(1) of the Act, 84 Stat. 1603, 29 U. S. C. § 660 (c)(1), provides in full:

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

hension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.[3] The question presented in the case before us is whether this regulation is consistent with the Act.

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[3] The regulation, 29 CFR § 1977.12 (1979), provides in full:

"(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11 (c) also protects employees from discrimination occurring because of the exercise 'of any right afforded by this Act.' Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

"(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8 (f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11 (c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

"(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that

## I

The petitioner company maintains a manufacturing plant in Marion, Ohio, for the production of household appliances. Overhead conveyors transport appliance components throughout the plant. To protect employees from objects that occasionally fall from these conveyors, the petitioner has installed a horizontal wire-mesh guard screen approximately 20 feet above the plant floor. This mesh screen is welded to angle-iron frames suspended from the building's structural steel skeleton.

Maintenance employees of the petitioner spend several hours each week removing objects from the screen, replacing paper spread on the screen to catch grease drippings from the material on the conveyors, and performing occasional maintenance work on the conveyors themselves. To perform these duties, maintenance employees usually are able to stand on the iron frames, but sometimes find it necessary to step onto the steel mesh screen itself.

In 1973, the company began to install heavier wire in the screen because its safety had been drawn into question. Several employees had fallen partly through the old screen, and on one occasion an employee had fallen completely through to the plant floor below but had survived. A number of maintenance employees had reacted to these incidents by bringing the unsafe screen conditions to the attention of their foremen. The petitioner company's contemporaneous safety instructions admonished employees to step only on the angle-iron frames.

On June 28, 1974, a maintenance employee fell to his death through the guard screen in an area where the newer, stronger

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there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."

mesh had not yet been installed.[4] Following this incident, the petitioner effectuated some repairs and issued an order strictly forbidding maintenance employees from stepping on either the screens or the angle-iron supporting structure. An alternative but somewhat more cumbersome and less satisfactory method was developed for removing objects from the screen. This procedure required employees to stand on power-raised mobile platforms and use hooks to recover the material.

On July 7, 1974, two of the petitioner's maintenance employees, Virgil Deemer and Thomas Cornwell, met with the plant maintenance superintendent to voice their concern about the safety of the screen. The superintendent disagreed with their view, but permitted the two men to inspect the screen with their foreman and to point out dangerous areas needing repair. Unsatisfied with the petitioner's response to the results of this inspection, Deemer and Cornwell met on July 9 with the plant safety director. At that meeting, they requested the name, address, and telephone number of a representative of the local office of the Occupational Safety and Health Administration (OSHA). Although the safety director told the men that they "had better stop and think about what [they] were doing," he furnished the men with the information they requested. Later that same day, Deemer contacted an official of the regional OSHA office and discussed the guard screen.[5]

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[4] As a result of this fatality, the Secretary conducted an investigation that led to the issuance of a citation charging the company with maintaining an unsafe walking and working surface in violation of 29 U. S. C. § 654 (a)(1). The citation required immediate abatement of the hazard and proposed a $600 penalty. Nearly five years following the accident, the Occupational Safety and Health Review Commission affirmed the citation, but decided to permit the petitioner six months in which to correct the unsafe condition. *Whirlpool Corp.*, 1979 CCH OSHD ¶ 23,552. A petition to review that decision is pending in the United States Court of Appeals for the District of Columbia Circuit.

[5] The record does not disclose the substance of this conversation beyond the fact that it concerned the safety of the guard screen.

The next day, Deemer and Cornwell reported for the night shift at 10:45 p. m. Their foreman, after himself walking on some of the angle-iron frames, directed the two men to perform their usual maintenance duties on a section of the old screen.[6] Claiming that the screen was unsafe, they refused to carry out this directive. The foreman then sent them to the personnel office, where they were ordered to punch out without working or being paid for the remaining six hours of the shift.[7] The two men subsequently received written reprimands, which were placed in their employment files.

A little over a month later, the Secretary filed suit in the United States District Court for the Northern District of Ohio, alleging that the petitioner's actions against Deemer and Cornwell constituted discrimination in violation of § 11 (c)(1) of the Act.[8] As relief, the complaint prayed, *inter alia*, that the petitioner be ordered to expunge from its personnel files all references to the reprimands issued to the two employees, and for a permanent injunction requiring the petitioner to compensate the two employees for the six hours of pay they had lost by reason of their disciplinary suspensions.

Following a bench trial, the District Court found that the regulation in question[9] justified Deemer's and Cornwell's refusals to obey their foreman's order on July 10, 1974. The court found that the two employees had "refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm," that the danger presented had been "real and not something which [had] existed only in the minds of the employees," that the employees had acted in good faith,

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[6] This order appears to have been in direct violation of the outstanding company directive that maintenance work was to be accomplished without stepping on the screen apparatus.

[7] Both employees apparently returned to work the following day without further incident.

[8] See n. 2, *supra*.

[9] See n. 3, *supra*.

and that no reasonable alternative had realistically been open to them other than to refuse to work. The District Court nevertheless denied relief, holding that the Secretary's regulation was inconsistent with the Act and therefore invalid. *Usery* v. *Whirlpool Corp.*, 416 F. Supp. 30, 32–34.

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. 593 F. 2d 715. Finding ample support in the record for the District Court's factual determination that the actions of Deemer and Cornwell had been justified under the Secretary's regulation, *id.*, at 719, n. 5,[10] the appellate court disagreed with the District Court's conclusion that the regulation is invalid. *Id.*, at 721–736. It accordingly remanded the case to the District Court for further proceedings. *Id.*, at 736. We granted certiorari, 444 U. S. 823, because the decision of the Court of Appeals in this case conflicts with those of two other Courts of Appeals on the important question in issue. See *Marshall* v. *Daniel Construction Co.*, 563 F. 2d 707 (CA5 1977); *Marshall* v. *Certified Welding Corp.*, No. 77–2048 (CA10 Dec. 28, 1978). That question, as stated at the outset of this opinion, is whether the Secretary's regulation authorizing employee "self-help" in some circumstances, 29 CFR § 1977.12 (b)(2) (1979), is permissible under the Act.

## II

The Act itself creates an express mechanism for protecting workers from employment conditions believed to pose an emergent threat of death or serious injury. Upon receipt of an employee inspection request stating reasonable grounds to believe that an imminent danger is present in a workplace,

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[10] In its petition for certiorari, the petitioner did not cite this aspect of the Court of Appeals' decision as raising a question for review. Accordingly, the issue of whether the regulation covers the particular circumstances of this case is not before the Court. This Court's Rule 23 (1)(c); *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 177–179.

OSHA must conduct an inspection. 29 U. S. C. § 657 (f)(1). In the event this inspection reveals workplace conditions or practices that "could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by" the Act,[11] 29 U. S. C. § 662 (a), the OSHA inspector must inform the affected employees and the employer of the danger and notify them that he is recommending to the Secretary that injunctive relief be sought. § 662 (c). At this juncture, the Secretary can petition a federal court to restrain the conditions or practices giving rise to the imminent danger. By means of a temporary restraining order or preliminary injunction, the court may then require the employer to avoid, correct, or remove the danger or to prohibit employees from working in the area. § 662 (a).[12]

To ensure that this process functions effectively, the Act expressly accords to every employee several rights, the exercise of which may not subject him to discharge or discrimination. An employee is given the right to inform OSHA of an imminently dangerous workplace condition or practice and request that OSHA inspect that condition or practice. 29 U. S. C.

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[11] These usual enforcement procedures involve the issuance of citations and imposition of penalties. When an OSHA inspection reveals a violation of 29 U. S. C. § 654 or of any standard promulgated under the Act, the Secretary may issue a citation for the alleged violation, fix a reasonable time for the dangerous condition's abatement, and propose a penalty. §§ 658 (a), 659 (a), 666. The employer may contest the citation and proposed penalty. §§ 659 (a), (c). Should he do so, the effective date of the abatement order is postponed until the completion of all administrative proceedings initiated in good faith. §§ 659 (b), 666 (d). Such proceedings may include a hearing before an administrative law judge and review by the Occupational Safety and Health Review Commission. §§ 659 (c), 661 (i).

[12] Such an order may continue pending the consummation of the Act's normal enforcement proceedings. § 662 (b).

§ 657 (f)(1).[13] He is given a limited right to assist the OSHA inspector in inspecting the workplace, §§ 657 (a)(2), (e), and (f)(2), and the right to aid a court in determining whether or not a risk of imminent danger in fact exists. See § 660 (c)(1). Finally, an affected employee is given the right to bring an action to compel the Secretary to seek injunctive relief if he believes the Secretary has wrongfully declined to do so. § 662 (d).

In the light of this detailed statutory scheme, the Secretary is obviously correct when he acknowledges in his regulation that, "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." [14] By providing for prompt notice to the employer of an inspector's intention to seek an injunction against an imminently dangerous condition, the legislation obviously contemplates that the employer will normally respond by voluntarily and speedily eliminating the danger. And in the few instances where this does not occur, the legislative provisions authorizing prompt judicial action are designed to give employees full protection in most situations from the risk of injury or death resulting from an imminently dangerous condition at the worksite.

As this case illustrates, however, circumstances may sometimes exist in which the employee justifiably believes that the express statutory arrangement does not sufficiently protect him from death or serious injury. Such circumstances will probably not often occur, but such a situation may arise when (1) the employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and (2) the employee has reason to believe that there is not sufficient time

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[13] Should the Secretary determine that "there are no reasonable grounds to believe that a violation or danger exists he shall notify the employe[e] . . . of such determination." § 657 (f)(1).

[14] See n. 3, *supra*.

or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.

Nothing in the Act suggests that those few employees who have to face this dilemma must rely exclusively on the remedies expressly set forth in the Act at the risk of their own safety. But nothing in the Act explicitly provides otherwise. Against this background of legislative silence, the Secretary has exercised his rulemaking power under 29 U. S. C. § 657 (g)(2) and has determined that, when an employee in good faith finds himself in such a predicament, he may refuse to expose himself to the dangerous condition, without being subjected to "subsequent discrimination" by the employer.

The question before us is whether this interpretative regulation [15] constitutes a permissible gloss on the Act by the Secretary, in light of the Act's language, structure, and legislative history. Our inquiry is informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555; *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356.

A

The regulation clearly conforms to the fundamental objective of the Act—to prevent occupational deaths and serious injuries.[16] The Act, in its preamble, declares that its purpose

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[15] The petitioner has raised no issue concerning whether or not this regulation was promulgated in accordance with the procedural requirements of the Administrative Procedure Act (APA), 5 U. S. C. § 553. Thus, we accept the Secretary's designation of the regulation as "interpretative," and do not consider whether it qualifies as an "interpretative rule" within the meaning of the APA, 5 U. S. C. § 553 (b)(A).

[16] The Act's legislative history contains numerous references to the Act's preventive purpose and to the tragedy of each individual death or accident. See, *e. g.*, S. Rep. No. 91–1282, p. 2 (1970) (hereinafter S. Rep.), Leg. Hist. 142; 116 Cong. Rec. 37628 (1970), Leg. Hist. 516–517 (Sen. Nelson);

and policy is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to *preserve* our human resources. . . ." 29 U. S. C. § 651 (b). (Emphasis added.)

To accomplish this basic purpose, the legislation's remedial orientation is prophylactic in nature. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 444–445. The Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring. It would seem anomalous to construe an Act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.

Moreover, the Secretary's regulation can be viewed as an appropriate aid to the full effectuation of the Act's "general duty" clause. That clause provides that "[e]ach employer . . .

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116 Cong. Rec. 37628, 37630 (1970), Leg. Hist. 518, 522 (Sen. Cranston); 116 Cong. Rec. 37630 (1970), Leg. Hist. 522–523 (Sen. Randolph); H. R. Rep. No. 91–1291, pp. 14, 23 (1970) (hereinafter H. R. Rep.), Leg. Hist. 844, 853; 116 Cong. Rec. 38366 (1970), Leg. Hist. 978 (Rep. Young); 116 Cong. Rec. 38367–38368 (1970), Leg. Hist. 981 (Rep. Anderson); 116 Cong. Rec. 38386 (1970), Leg. Hist. 1031, 1032 (Rep. Dent); 116 Cong. Rec. 42203 (1970), Leg. Hist. 1210 (Rep. Daniels). As stated by Senator Yarborough, a sponsor of the Senate bill:

"We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact." 116 Cong. Rec. 37625 (1970), Leg. Hist. 510.

House and Senate debates are reprinted, along with the House, Senate, and Conference Reports, in a one-volume Committee Print entitled Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (June 1971) (cited *supra* and hereafter as Leg. Hist.).

shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U. S. C. § 654 (a)(1). As the legislative history of this provision reflects,[17] it was intended itself to deter the occurrence of occupational deaths and serious injuries by placing on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary. Since OSHA inspectors cannot be present around the clock in every workplace, the Secretary's regulation ensures that employees will in all circumstances enjoy the rights afforded them by the "general duty" clause.

The regulation thus on its face appears to further the overriding purpose of the Act, and rationally to complement its remedial scheme.[18] In the absence of some contrary indication in the legislative history, the Secretary's regulation must, therefore, be upheld, particularly when it is remembered that safety legislation is to be liberally construed to effectuate the congressional purpose. *United States* v. *Bacto-Unidisk*, 394 U. S. 784, 798; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 486.

B

In urging reversal of the judgment before us, the petitioner relies primarily on two aspects of the Act's legislative history.

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[17] See S. Rep. 9–10, Leg. Hist. 149–150; H. R. Rep. 21–22, Leg. Hist. 851–852.

[18] It is also worth noting that the Secretary's interpretation of 29 U. S. C. § 660 (c)(1) conforms to the interpretation that Congress clearly wished the courts to give to the parallel antidiscrimination provision of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 801 *et seq.* (1976 ed. and Supp. II). The legislative history of that provision, 30 U. S. C. § 815 (c)(1) (1976 ed., Supp. II), establishes that Congress intended it to protect "the refusal to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 95–181, p. 35 (1977). See *id.*, at 36; 123 Cong. Rec. 20043–20044 (1977) (remarks of Sen. Church, Sen. Williams, Sen. Javits).

1

Representative Daniels of New Jersey sponsored one of several House bills that led ultimately to the passage of the Act.[19] As reported to the House by the Committee on Education and Labor, the Daniels bill contained a section that was soon dubbed the "strike with pay" provision.[20] This section provided that employees could request an examination by

[19] H. R. 16785, 91st Cong., 2d Sess. (1970), Leg. Hist. 893–976 (bill as reported to the House). See H. R. Rep., Leg. Hist. 831.

[20] Section 19 (a)(5) of H. R. 16785, *supra*, Leg. Hist. 969–970 (as reported to the House floor) provided in relevant part:

"The Secretary of Health, Education, and Welfare shall publish . . . a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potentially toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education, and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substance designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees, by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."

The Committee Report explained the provision as follows:

"There is still a real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay. . . . Nothing herein restricts the right of the employer, except as he is obligated under other agreements, to assign a worker to other non-prohibited work during this time. This should eliminate possible abuse by allowing the employer to avoid payment for work not performed." H. R. Rep. 30, Leg. Hist. 860.

the Department of Health, Education, and Welfare (HEW) of the toxicity of any materials in their workplace. If that examination revealed a workplace substance that had "potentially toxic or harmful effects in such concentration as used or found," the employer was given 60 days to correct the potentially dangerous condition. Following the expiration of that period, the employer could not require that an employee be exposed to toxic concentrations of the substance unless the employee was informed of the hazards and symptoms associated with the substance, the employee was instructed in the proper precautions for dealing with the substance, and the employee was furnished with personal protective equipment. If these conditions were not met, an employee could "absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."

This provision encountered stiff opposition in the House. Representative Steiger of Wisconsin introduced a substitute bill containing no "strike with pay" provision.[21] In response, Representative Daniels offered a floor amendment that, among other things, deleted his bill's "strike with pay" provision.[22]

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[21] H. R. 19200, 91st Cong., 2d Sess. (1970), Leg. Hist. 763–830 (bill as originally introduced). See H. Res. 1218, 91st Cong., 2d Sess. (1970), Leg. Hist. 977.

[22] 116 Cong. Rec. 38376, 38377–38378, 38707 (1970), Leg. Hist. 1004, 1005, 1008–1009, 1071 (Rep. Daniels). See 116 Cong. Rec. 38369 (1970), Leg. Hist. 986 (Rep. Perkins). Representative Daniels explained to the House why he was proposing his amendment:

"The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm." 116 Cong. Rec. 38377–38378 (1970), Leg. Hist. 1009.

He suggested that employees instead be afforded the right to request an immediate OSHA inspection of the premises, a right which the Steiger bill did not provide. The House ultimately adopted the Steiger bill.[23]

The bill that was reported to and, with a few amendments, passed by the Senate never contained a "strike with pay" provision.[24] It did, however, give employees the means by which they could request immediate Labor Department inspections.[25] These two characteristics of the bill were underscored on the floor of the Senate by Senator Williams, the bill's sponsor.[26]

After passage of the Williams bill by the Senate, it and the Steiger bill were submitted to a Conference Committee. There, the House acceded to the Senate bill's inspection request provisions.[27]

The petitioner reads into this legislative history a congressional intent incompatible with an administrative interpretation of the Act such as is embodied in the regulation at issue in this case. The petitioner argues that Congress' overriding

[23] 116 Cong. Rec. 38715 (teller vote), 38723–38724 (rollcall vote) (1970), Leg. Hist. 1091, 1112–1115.

Representative Daniels' proposed amendments were never acted upon. His original bill was voted down in favor of the Steiger bill. See 116 Cong. Rec. 38704–38705 (1970), Leg. Hist. 1064 (the Chairman and Rep. Perkins); 116 Cong. Rec. 38707 (1970), Leg. Hist. 1072 (Rep. O'Hara).

[24] S. 2193, 91st Cong., 2d Sess. (1970), Leg. Hist. 204–295 (bill as reported to Senate by Senate Committee on Labor and Public Welfare). See S. Rep., Leg. Hist. 141.

[25] See S. 2193, *supra*, § 8 (f)(1), Leg. Hist. 252–253.

[26] "[D]espite some wide-spread contentions to the contrary, . . . the committee bill does not contain a so-called strike-with-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection." 116 Cong. Rec. 37326 (1970), Leg. Hist. 416.

[27] H. R. Conf. Rep. No. 91–1765, pp. 37–38 (1970), Leg. Hist. 1190–1191. See 29 U. S. C. § 657 (f).

concern in rejecting the "strike with pay" provision was to avoid giving employees a unilateral authority to walk off the job which they might abuse in order to intimidate or harass their employer. Congress deliberately chose instead, the petitioner maintains, to grant employees the power to request immediate administrative inspections of the workplace which could in appropriate cases lead to coercive judicial remedies. As the petitioner views the regulation, therefore, it gives to workers precisely what Congress determined to withhold from them.

We read the legislative history differently. Congress rejected a provision that did not concern itself at all with conditions posing real and immediate threats of death or severe injury. The remedy which the rejected provision furnished employees could have been invoked only after 60 days had passed following HEW's inspection and notification that improperly high levels of toxic substances were present in the workplace. Had that inspection revealed employment conditions posing a threat of imminent and grave harm, the Secretary of Labor would presumably have requested, long before expiration of the 60-day period, a court injunction pursuant to other provisions of the Daniels bill.[28] Consequently, in rejecting the Daniels bill's "strike with pay" provision, Congress was not rejecting a legislative provision dealing with the highly perilous and fast-moving situations covered by the regulation now before us.

It is also important to emphasize that what primarily troubled Congress about the Daniels bill's "strike with pay" provision was its requirement that employees be paid their regular salary after having properly invoked their right to refuse to work under the section.[29] It is instructive that virtually

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[28] See H. R. 16785, *supra* n. 19, § 12 (b), Leg. Hist. 956 (bill as reported to House).

[29] Congress' concern necessarily was with the provision's compensation requirement. The law then, as it does today, already afforded workers a

every time the issue of an employee's right to absent himself from hazardous work was discussed in the legislative debates, it was in the context of the employee's right to continue to receive his usual compensation.[30]

When it rejected the "strike with pay" concept, therefore, Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay

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right, under certain circumstances, to walk off their jobs when faced with hazardous conditions. See 116 Cong. Rec. 42208 (1970), Leg. Hist. 1223–1224 (Rep. Scherle) (reference to Taft-Hartley Act). Under Section 7 of the National Labor Relations Act, 29 U. S. C. § 157, employees have a protected right to strike over safety issues. See *NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9. Similarly, Section 502 of the Labor Management Relations Act, 29 U. S. C. § 143, provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike." The effect of this section is to create an exception to a no-strike obligation in a collective-bargaining agreement. *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368, 385.

The existence of these statutory rights also makes clear that the Secretary's regulation does not conflict with the general pattern of federal labor legislation in the area of occupational safety and health. See also 29 CFR § 1977.18 (1979).

[30] See 116 Cong. Rec. 37326 (1970), Leg. Hist. 416 (Sen. Williams); 116 Cong. Rec. 38369 (1970), Leg. Hist. 986 (Rep. Perkins); 116 Cong. Rec. 38376, 38377–38378, 38707 (1970), Leg. Hist. 1005, 1009, 1071 (Rep. Daniels); 116 Cong. Rec. 38379 (1970), Leg. Hist. 1011 (Rep. Randall); 116 Cong. Rec. 38391 (1970), Leg. Hist. 1046 (Rep. Feighan); 116 Cong. Rec. 38714 (1970), Leg. Hist. 1089 (Rep. Horton).

The petitioner cites two passages in the legislative debates that, at first blush, appear to suggest that Congress was also concerned with employee walkouts not accompanied by pay. One is a statement by Representative Cohelan, a supporter of the Daniels bill, that "a comprehensive occupational safety and health program . . . must permit the worker to leave his post whenever and wherever conditions exist that endanger his health or safety." 116 Cong. Rec. 38375 (1970), Leg. Hist. 1001. The other is a statement by another Member that the Daniels bill did not authorize "strikes without pay." 116 Cong. Rec. 38708 (1970), Leg. Hist. 1075. Read in context, however, it is clear that both statements were referring to the "strike with pay" provision contained in the Daniels bill.

their employees their regular paychecks when they absented themselves from work for reasons of safety. But the regulation at issue here does not require employers to pay workers who refuse to perform their assigned tasks in the face of imminent danger. It simply provides that in such cases the employer may not "discriminate" against the employees involved. An employer "discriminates" against an employee only when he treats that employee less favorably than he treats others similarly situated.[31]

2

The second aspect of the Act's legislative history upon which the petitioner relies is the rejection by Congress of provisions contained in both the Daniels and the Williams bills that would have given Labor Department officials, in imminent-danger situations, the power temporarily to shut down all or part of an employer's plant.[32] These provisions aroused con-

[31] Deemer and Cornwell were clearly subjected to "discrimination" when the petitioner placed reprimands in their respective employment files. Whether the two employees were also discriminated against when they were denied pay for the approximately six hours they did not work on July 10, 1974, is a question not now before us. The District Court dismissed the complaint without indicating what relief it thought would have been appropriate had it upheld the Secretary's regulation. The Court of Appeals expressed no view concerning the limits of the relief to which the Secretary might ultimately be entitled. On remand, the District Court will reach this issue.

[32] The version contained in the Daniels bill would have authorized the Secretary to issue a shutdown order of no more than five days' duration. See H. R. 16785, *supra* n. 19, § 12 (a), Leg. Hist. 955–956 (bill as reported to the House); H. R. Rep. 25, Leg. Hist. 855.

As reported to the Senate, the version contained in the Williams bill limited the permissible duration of the administrative order to 72 hours and required that a Regional Director of the Labor Department concur in the order. S. 2193, *supra* n. 24, § 11 (b), Leg. Hist. 263–264. See S. Rep. 12–13, Leg. Hist. 152–153; S. Rep. 56–57, Leg. Hist. 195–196 (individual views of Sen. Javits). On the floor of the Senate, amendments were adopted that would have required the Labor Department official

siderable opposition in both Houses of Congress. The hostility engendered in the House of Representatives led Representative Daniels to delete his version of the provision in proposing amendments to his original bill.[33] The Steiger bill that ultimately passed the House gave the Labor Department no such authority.[34] The Williams bill, as approved by the Senate, did contain an administrative shutdown provision, but the Conference Committee rejected this aspect of the Senate bill.[35]

The petitioner infers from these events a congressional will hostile to the regulation in question here. The regulation, the petitioner argues, provides employees with the very authority to shut down an employer's plant that was expressly denied a more expert and objective United States Department of Labor.

As we read the pertinent legislative history, however, the petitioner misconceives the thrust of Congress' concern. Those in Congress who prevented passage of the administra-

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authorizing the inspector's actions to be an official appointed with the advice and consent of the Senate and that would have mandated that the employer be given prior notice of the reasons for the shutdown. 116 Cong. Rec. 37621–37622 (1970), Leg. Hist. 499–500; 116 Cong. Rec. 37624–37625 (1970), Leg. Hist. 508–509. See S. 2193, *supra* n. 24, § 12 (b), Leg. Hist. 562–563 (bill as passed by Senate).

[33] 116 Cong. Rec. 38372, 38376, 38378, 38707 (1970), Leg. Hist. 993, 1005, 1009–1010, 1011, 1071 (Rep. Daniels). As Representative Daniels explained:

"[B]usiness groups have expressed great fears about the potential for abuse. They believe that the power to shut down a plant should not be vested in an inspector. While there is no documentation for this fear, we recognize that it is very prevalent. The Courts have shown their capacity to respond quickly in emergency situations, and we believe that the availability of temporary restraining orders will be sufficient to deal with emergency situations. Under the Federal rules of civil procedure, these orders can be used *ex parte*. If the Secretary uses the authority that he is given efficiently and expeditiously, he should be able to get a court order within a matter of minutes rather than hours." 116 Cong. Rec. 38378 (1970), Leg. Hist. 1009–1010.

[34] H. R. 19200, *supra* n. 21, § 12, Leg. Hist. 796–798.

[35] H. R. Conf. Rep. No. 91–1765, *supra* n. 27, at 40, Leg. Hist. 1193.

tive shutdown provisions in the Daniels and Williams bills were opposed to the unilateral authority those provisions gave to federal officials, without any judicial safeguards, drastically to impair the operation of an employer's business.[36] Congressional opponents also feared that the provisions might jeopardize the Government's otherwise neutral role in labor-management relations.[37]

Neither of these congressional concerns is implicated by the regulation before us. The regulation accords no authority to Government officials. It simply permits private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety. The employees have no power under the regulation to order their employer to correct the hazardous condition or to clear the dangerous workplace of others. Moreover, any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith. The regulation, therefore, does not remotely resemble the legislation that Congress rejected.

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[36] See 116 Cong. Rec. 35607, 37602 (1970), Leg. Hist. 299, 452–453 (Sen. Saxbe); 116 Cong. Rec. 37338 (1970), Leg. Hist. 425 (Sen. Dominick); 116 Cong. Rec. 37602 (1970), Leg. Hist. 453–454 (Sen. Schweiker); 116 Cong. Rec. 41763 (1970), Leg. Hist. 1149 (Sen. Prouty); H. R. Rep. 55–57, Leg. Hist. 885–887 (minority report); 116 Cong. Rec. 38368 (1970), Leg. Hist. 983 (Rep. Anderson); 116 Cong. Rec. 38372, 38702 (1970), Leg. Hist. 992, 1058 (Rep. Steiger); 116 Cong. Rec. 38378–38379 (1970), Leg. Hist. 1011–1012 (Rep. Randall); 116 Cong. Rec. 38393 (1970), Leg. Hist. 1050 (Rep. Michel); 116 Cong. Rec. 38394 (1970), Leg. Hist. 1052 (Rep. Broomfield); 116 Cong. Rec. 38704 (1970), Leg. Hist. 1062 (Rep. Sikes); 116 Cong. Rec. 38713 (1970), Leg. Hist. 1087 (Rep. Robison); 116 Cong. Rec. 42203 (1970), Leg. Hist. 1210 (Rep. Daniels).

[37] See 116 Cong. Rec. 37346 (1970), Leg. Hist. 448 (Sen. Tower); H. R. Rep. 55–57, Leg. Hist. 885–887 (minority report); 116 Cong. Rec. 38393 (1970), Leg. Hist. 1050 (Rep. Michel). Some of these Members of Congress expressed particular fears over the possible pressures which might be brought to bear on an inspector during a strike.

C

For these reasons we conclude that 29 CFR § 1977.12 (b)(2) (1979) was promulgated by the Secretary in the valid exercise of his authority under the Act. Accordingly, the judgment of the Court of Appeals is affirmed.

*It is so ordered.*

Syllabus

## UNITED STATES *v.* CLARK, GUARDIAN

APPEAL FROM THE UNITED STATES COURT OF CLAIMS

No. 78-1513. Argued October 31, 1979—Decided February 26, 1980

*Held:* Under the provisions of the Civil Service Retirement Act whereby a deceased federal employee's legitimate children under 18 years of age qualify for survivors' benefits but "recognized natural" children under 18 may recover only if they "lived with the employee . . . in a regular parent-child relationship," a recognized natural child is entitled to survivors' benefits when the child has lived with the deceased employee in a "regular parent-child relationship," regardless of whether the child was living with the employee at the time of his death. This construction of the statutory provisions is fair and reasonable in light of the language, purpose, and history of the enactment and avoids a serious constitutional question under the equal protection component of the Due Process Clause of the Fifth Amendment. Even if the "lived with" requirement is assumed to serve as a device to thwart fraudulent claims of dependency or parentage or to promote efficient administration by facilitating the prompt identification of eligible annuitants, to construe the provision as applying only to illegitimate children living with the employee at the time of death would raise serious equal protection problems that this Court must seek to avoid by adopting a saving statutory construction not at odds with fundamental legislative purposes. Pp. 26-34.

218 Ct. Cl. 705, 590 F. 2d 343, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., joined, *post*, p. 34. REHNQUIST, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 36.

*Harriet S. Shapiro* argued the cause for the United States. With her on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Schiffer,* and *Deputy Solicitor General Easterbrook.*

*Edward L. Merrigan* argued the cause and filed a brief for appellee.*

**Toby S. Edelman, Edward C. King,* and *Bruce K. Miller* filed a brief for Barbara Jenkins as *amicus curiae* urging affirmance.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This appeal presents the question whether illegitimate children of a federal civil service employee are entitled to survivors' benefits under the Civil Service Retirement Act when the children once lived with the employee in a familial relationship, but were not living with the employee at the time of his death.

I

George Isaacson and the appellee Patricia Clark lived together from 1965 through 1971 without benefit of matrimony. They had two children, Shawn and Tricia Clark, born in 1968 and 1971, respectively, and the four lived together as a family. After the appellee and Isaacson separated, the appellee filed a state-court action in Montana seeking a determination of the paternity of the children. In June 1972, the Montana court issued a decree determining that Isaacson was the natural father of the children and ordering him to contribute to their support. Isaacson provided monthly support payments up to the time of his death in 1974.

At the time of death, Isaacson was a federal employee covered by the Civil Service Retirement Act, 5 U. S. C. § 8331 *et seq.* The Act provides that each surviving child of a deceased federal employee is entitled to a survivors' annuity. 5 U. S. C. § 8341 (e)(1). All legitimate and adopted children under 18 years of age qualify for these benefits, but stepchildren or "recognized natural" children under 18 may recover only if they "lived with the employee . . . in a regular parent-child relationship." 5 U. S. C. § 8341 (a)(3)(A). In September 1974, the Civil Service Commission's Bureau of Retirement, Insurance, and Occupational Health denied the appellee's application for such annuities for Shawn and Tricia. The Bureau held that 5 U. S. C. § 8341 (a)(3)(A) bars recovery for otherwise qualified children born out of wedlock who, like Shawn and Tricia, were not living with the employee

at the time of his death. The Commission's Board of Appeals and Review affirmed.[1]

The appellee then filed this action in the Court of Claims on behalf of her children. She argued that 5 U. S. C. § 8341 (a)(3)(A) allows recovery where, as here, the recognized natural children had once lived with the employee in a parent-child relationship. Alternatively she contended that, if the Commission's interpretation of 5 U. S. C. § 8341 (a)(3)(A) was correct, that provision violated the equal protection component of the Due Process Clause of the Fifth Amendment because it impermissibly discriminated against illegitimate children.

The Court of Claims granted the appellee's motion for summary judgment. 218 Ct. Cl. 705, 590 F. 2d 343. Ignoring the statutory issue, the court granted relief on the authority of its earlier decision in *Gentry* v. *United States*, 212 Ct. Cl. 1, 546 F. 2d 343 (1976), rehearing denied, 212 Ct. Cl. 27, 551 F. 2d 852 (1977), which held that the "lived with" requirement of 5 U. S. C. § 8341 (a)(3)(A) unconstitutionally discriminated against illegitimate children. We postponed consideration of our jurisdiction pending hearing on the merits, 441 U. S. 960 (1979), and now affirm on the statutory ground presented to but not addressed by the Court of Claims.[2]

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[1] On January 1, 1979, the Civil Service Commission was abolished, and the Office of Personnel Management assumed primary responsibility for the civil service retirement program. See Civil Service Reform Act of 1978, Pub. L. 95–454, 92 Stat. 1111; Reorg. Plan No. 2 of 1978, 3 CFR 323 (1979). For convenience, throughout this opinion we shall refer to the agency administering the retirement program as the Civil Service Commission.

[2] The appellee contends that this Court does not have jurisdiction to entertain this appeal. We disagree.

By an order dated January 27, 1978, the Court of Claims held that the "lived with" requirement of 5 U. S. C. § 8341 (a)(3)(A) applicable to illegitimate children violated the equal protection component of the Due Process Clause of the Fifth Amendment. The court then resolved the issue

## II

The Civil Service Retirement Act provides survivors' annuities to all legitimate children, but grants the same benefits to

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of relief and entered final judgment on November 6, 1978. The Government filed its notice of appeal on December 5, 1978.

The appeal statute relied upon by the Government, 28 U. S. C. § 1252, provides:

"Any party *may* appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." (Emphasis added.)

The appellee first contends that the Government failed to file a timely notice of appeal because it did not appeal the January 27, 1978, decision on the liability issue. Section 1252 would have allowed the Government to seek review of this interlocutory order declaring a federal statute unconstitutional, but its permissive language providing that any party "may appeal . . . from an interlocutory or final judgment" plainly did not require the Government to appeal before final judgment was entered. Cf. *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709 (1963) (review of final judgment under 28 U. S. C. § 1255 entails review of any interlocutory decisions on liability); *Marconi Wireless Telegraph Co.* v. *United States*, 320 U. S. 1, 47–48 (1943) (same); *American Foreign S. S. Co.* v. *Matise*, 423 U. S. 150 (1975) (same rule when jurisdiction based on 28 U. S. C. § 1254); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418 (1923) (same).

The appellee also argues that no appeal will lie under 28 U. S. C. § 1252 because the Court of Claims did not declare an Act of Congress unconstitutional. To the contrary, a determination that the "lived with" requirement of 5 U. S. C. § 8341 (a)(3)(A) was unconstitutional was a necessary predicate to the relief the Court of Claims granted to the appellee's children, and this determination of unconstitutionality may be appealed under § 1252. *McLucas* v. *DeChamplain*, 421 U. S. 21, 30 (1975); *United States* v. *Raines*, 362 U. S. 17, 20 (1960). It is irrelevant that the Court of Claims reached this holding by relying on its earlier decision in *Gentry* v. *United States*, 212 Ct. Cl. 1, 546 F. 2d 343 (1976), rehearing denied, 212 Ct. Cl. 27, 551 F. 2d 852 (1977). An appeal under § 1252 lies for any federal-court decision declaring an Act of Congress unconstitutional in a civil action in which the United States is a party, not just for

children born out of wedlock only if they "lived with the employee . . . in a regular parent-child relationship." Such a classification based on illegitimacy is unconstitutional unless it bears "an evident and substantial relation to the particular . . . interests this statute is designed to serve." *Lalli* v. *Lalli*, 439 U. S. 259, 268 (1978) (plurality opinion); see *id.*, at 279 (BRENNAN, J., dissenting). See also *Trimble* v. *Gordon*, 430 U. S. 762, 767 (1977).[3] The Government's asserted justification for the classification—that it is an administratively convenient means of identifying children who actually were deprived of support by the employee's death—is itself open to constitutional question, since the statute does not condition benefits to legitimate children on such a showing.

It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided. *E. g., Califano* v. *Yamasaki*, 442 U. S. 682, 693 (1979); *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 582, and n. 22 (1979); *Machinists* v. *Street*, 367 U. S. 740, 749–750 (1961); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944). Where both a constitutional issue and an issue of statutory construction are raised, we are not, of course, foreclosed from considering the statutory question merely because the lower court failed to address it. *Califano* v. *Yamasaki, supra*, at 693; *University of California Regents* v. *Bakke*, 438 U. S. 265, 328 (1978)

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the first such decision. Cf. *Garment Workers* v. *Donnelly Garment Co.*, 304 U. S. 243, 249 (1938).

[3] The lower federal courts have uniformly held that the "lived with" requirement violates the equal protection component of the Due Process Clause of the Fifth Amendment. *Gentry* v. *United States, supra; Jenkins* v. *U. S. Civil Service Comm'n*, 460 F. Supp. 611 (DC 1978); *Proctor* v. *United States*, 448 F. Supp. 418 (DC 1977) (three-judge court); *Tenny* v. *United States*, 441 F. Supp. 224 (ED Mo. 1977); *Myers* v. *Commissioners of Civil Service Comm'n*, Civ. No. 8682 (SD Ohio, Aug. 8, 1977).

(opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); *id.*, at 281 (opinion of POWELL, J.); *id.*, at 411–412 (opinion of STEVENS, J.). Accordingly, we turn to the statute to determine whether resolution of the constitutional question is necessary to the disposition of this case.

Shawn and Tricia Clark were denied annuities on the ground that they did not meet the statutory requirement that they "lived with the employee . . . in a regular parent-child relationship." The appellee contended that her children did meet the requirement because they had lived with the decedent as a family from their birth through 1971. If the appellee's construction of the statutory language is correct, the children are entitled to survivors' annuities and decision of the constitutional question is unnecessary. The Civil Service Commission, however, has construed the "lived with" language to require that the children be living with the employee at the time of the employee's death.

When the statutory language is considered on its face, the appellee's reading is at least as plausible as that of the Government. Shawn and Tricia had "lived with" their father, and we believe those words would not ordinarily imply a temporal limitation. Moreover, Congress has demonstrated in other social welfare legislation that it knows how to restrict the class of eligible beneficiaries to those living with an individual at a particular time.[4]

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[4] See 45 U. S. C. § 231e (c)(1)(i) (Railroad Retirement Act benefits payable in certain circumstances to "the widow or widower of the deceased employee who was living with such employee at the time of such employee's death"); 42 U. S. C. § 416 (e) (Social Security Act in part defines legally adopted child as a person who "was at the time of such individual's death living in such individual's household"); 42 U. S. C. § 416 (h)(3)(A)(ii) (Social Security Act's definition of qualified child is met in part when "such insured individual is shown . . . to be the father of the applicant and was living with or contributing to the support of the applicant at the time such insured individual became entitled to benefits or attained age 65, whichever first occurred").

We can find nothing in the legislative history of the statute to indicate that appellee's construction of the statute is out of harmony with the congressional intent. The original enactment in 1948 made an annuity payable to "an unmarried child, including a dependent stepchild or an adopted child, under the age of eighteen years, or such unmarried child who because of physical or mental disability is incapable of self-support." Act of Feb. 28, 1948, § 11, 62 Stat. 55. The amount of the annuity depended on whether another parent survived. Although children born out of wedlock were not expressly included, the provision was seemingly broad enough to cover them.[5] The Government argues that, in granting annuities to surviving children, Congress intended to provide funds to replace support lost by the wage earner's dependents. The Government views the statutory scheme as designed to pay benefits only to those children Congress thought most likely to have been dependent on the wage earner, and to take account of the likelihood of supplementary support from the other parent. We note, however, that only stepchildren were required to show dependency.[6]

In 1956, Congress amended the definition of an entitled child to include "an unmarried child, including (1) an adopted child, and (2) a stepchild or recognized natural child who received more than one-half his support from and lived with the . . . employee in a regular parent-child relationship." Act of July 31, 1956, Title IV, § 1 (j), 70 Stat. 744.[7] For the

[5] See *Visor* v. *United States*, Civ. No. 9922 (2) (ED Mo., Feb. 12, 1955).

[6] By authorizing the payment of benefits to an "unmarried child who because of physical or mental disability is incapable of self-support," Act of Feb. 28, 1948, 62 Stat. 55, Congress apparently intended that, though disabled children over 18 years of age had to show they were unable to support themselves, they did not have to show they were dependent on the deceased parent.

[7] The 1956 amendments also provided that a survivors' annuity was payable to a legitimate child with a surviving parent only if the child proved that he had received more than one-half his support from the

first time children born out of wedlock were explicitly included, but their eligibility was made subject both to the "lived with" requirement and to the dependency requirement originally applicable only to stepchildren.

The legislative history is devoid of any indication whether Congress intended that annuities could be recovered by all recognized natural children who had once lived with the employee in a familial relationship, or only by such children who were living with the employee at the time of death. Nor do the congressional materials illuminate the purpose of the "lived with" requirement. The Government defends the provision as a rational indicator of both dependency and parentage. An illegitimate child who lived with the natural parent, according to this view, is both more likely to have received support from the parent and more likely to be the true issue of that parent than is any illegitimate child who lived apart from the natural parent. It seems unlikely that Congress viewed the requirement as a means of ascertaining either dependency or parentage, however, since the statute also required the child to prove both that he had received more than one-half of his support from the deceased employee and that he was the employee's "recognized natural child." Those provisions speak directly to the concerns raised by the Government, and the additional requirement that the child must have lived with the parent would therefore be superfluous regardless of whether it mandated that the child must have lived with the parent at the time of the parent's death rather than at some other time.

The Government also urges that Congress intended the "lived with" requirement to serve as a means of thwarting fraudulent claims of dependency or parentage, and to promote efficient administration by facilitating the prompt identification of eligible annuitants. It is evident from the facts

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deceased employee. Act of July 31, 1956, amending Title IV, § 10 (d), 70 Stat. 754.

of this case, however, that the classification is not narrowly tailored as a means of furthering either goal. As we recognized in *Jimenez* v. *Weinberger*, 417 U. S. 628, 636 (1974), the prevention of fraud is a legitimate goal, but it does not necessarily follow "that the blanket and conclusive exclusion of [appellee's] subclass of illegitimates is reasonably related to the prevention of spurious claims." Thus, even if the "lived with" requirement is assumed to serve as a device to prevent fraud or to promote efficient administration, it raises serious equal protection problems that this Court must seek to avoid by adopting a saving statutory construction not at odds with fundamental legislative purposes.

In sum, the legislative history of the 1956 amendments provides no direct guidance on the purpose of the "lived with" provision or on whether it was intended to be restricted to children living with the parent at a particular time. The less restrictive construction proposed by the appellee appears fair and reasonable in light of the language, purpose, and history of the enactment, and it avoids a serious constitutional question. Before we conclude our inquiry, however, we must consider whether a 1966 amendment to the statute affected the children's right to recovery.

Congress enacted the 1966 amendments to the Act upon the request of the Executive Branch's Committee on Federal Staff Retirement Systems. One of these amendments removed the requirement that children must prove they received one-half of their support from the deceased employee in order to recover survivors' annuities. Act of July 18, 1966, Title V, § 502, 80 Stat. 300. Congress deleted the dependency requirement in order to ensure recovery for the children of female civil servants, who typically earned less than their husbands and accordingly contributed less than half of the support of their children.[8] Congress also deleted the require-

[8] See S. Rep. No. 1187, 89th Cong., 2d Sess., 5 (1966); The Federal Salary and Fringe Benefits Act of 1966: Hearings on H. R. 14122 before

ment of proof of dependency for stepchildren and "recognized natural" children, but retained the "lived with" requirement for those claimants. The reason for retaining the requirement was not clearly explained in the Cabinet Committee report, which simply stated:

> "Stepchildren and natural children are eligible for benefits at present only when they have been dependent on the deceased parent and living with the parent in a regular parent-child relationship. The latter requirement should be retained; but, if it is fulfilled, the benefits should be paid as for any other child, without regard to the dependency requirement." H. R. Doc. No. 402, 89th Cong., 2d Sess., 41 (1966).

The Government views the 1966 amendment as evidence that Congress intended the "lived with" requirement to serve as a convenient method of determining whether the child received support from the deceased employee. This proposition appears implausible, since in the same sentence the Committee recommended that if the "lived with" requirement were met benefits should be paid "as for any other child, without regard to the dependency requirement." The Committee's use of the word "retained" is a further indication that Congress did not intend the "lived with" provision to assume a new function previously performed by the dependency requirement. Moreover, the Government's position again unnecessarily raises the equal protection question, because legitimate children and adopted children were not required to demonstrate that they had received support from the decedent. In the absence of any persuasive evidence to the contrary, therefore, we assume that Congress' failure to alter the "lived

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the Senate Committee on Post Office and Civil Service, 89th Cong., 2d Sess., 7 (1966); Joint Annual Report of the Director of the Bureau of the Budget and the Chairman of the Civil Service Commission and the Report of the Cabinet Committee on Federal Staff Retirement Systems, H. R. Doc. No. 402, 89th Cong., 2d Sess., 41 (1966).

with" requirement likewise failed to modify the purpose of that provision as envisioned by the Congress that enacted it.[9]

We conclude that the "lived with" requirement is satisfied when a recognized natural child has lived with the deceased employee in a "regular parent-child relationship," regardless of whether the child was living with the employee at the time of the employee's death. Our consideration of the language and purpose of the statute and of the available legislative history convinces us that this construction is a fair and reasonable reading of the congressional enactment.[10] Furthermore,

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[9] Two Committees of Congress, in passing on requests for legislation by the Civil Service Commission, have referred to the "lived with" requirement as a "living with" requirement. S. Rep. No. 92-527, p. 1 (1971); S. Rep. No. 1070, 89th Cong., 2d Sess., 1 (1966). See also H. R. Rep. No. 92-811, p. 3 (1972); H. R. Rep. No. 33, 89th Cong., 1st Sess., 3 (1965). We read the Committees' statements as nothing more than acknowledgments of the Commission's interpretation of the requirement, which was made known to each Committee by letters from the Commission. S. Rep. No. 92-527, *supra*, at 2-3; S. Rep. No. 1070, *supra*, at 3-4. In any event, the views of some Congressmen as to the construction of a statute adopted years before by another Congress have "'very little, if any, significance.'" *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 170 (1968) (quoting *Rainwater* v. *United States*, 356 U. S. 590, 593 (1958)).

The 1966 recommendation of the Cabinet Committee on Federal Staff Retirement Systems referred to the "lived with" requirement as allowing benefits to recognized natural children "when they have been . . . living with the parent in a regular parent-child relationship." H. R. Doc. No. 402, 89th Cong., 2d Sess., 41 (1966). This language might appear to be inconsistent with our construction of the "lived with" requirement. The language was formulated by the Executive Branch, however, not by Congress, and at most simply reflects the Civil Service Commission's interpretation of the statute.

[10] We recognize that the Civil Service Commission has interpreted the "lived with" requirement to be a "living with" requirement, although the Government does not inform us whether the agency interpretation was contemporaneous with the 1956 enactment. We do not disregard this evidence of the meaning of the statute. See, *e. g.*, *Batterton* v. *Francis*, 432 U. S. 416, 425, n. 9 (1977). In view of our analysis of the statute and its legislative history, and considering the need to avoid unnecessary con-

the construction is necessary to avoid a serious constitutional question. By so holding, we do not believe that we are creating undue administrative difficulties for the Civil Service Commission. In this case, for example, the Commission relied on the Montana court's paternity decree and affidavits concerning when the appellee's children lived with the deceased employee. Similar documentary evidence would be equally probative of whether an illegitimate child claiming a survivors' annuity had ever lived with the deceased employee in a regular parent-child relationship.[11]

The judgment of the Court of Claims is

*Affirmed.*

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

The question in this case is whether the illegitimate children of a federal employee, who lived with his children after their birth and had a legal obligation to contribute to their support until his death, are eligible to receive survivors' benefits under the Civil Service Retirement Act, 5 U. S. C. § 8331 *et seq.* The statutory definition of "child" under that Act includes a "recognized natural chiid who lived with the employee . . . in a regular parent-child relationship." 5 U. S. C. § 8341 (a)(3)

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stitutional adjudication, however, the agency interpretation would not be decisive even if it were contemporaneous.

[11] Because we hold that the Civil Service Retirement Act expressly allows the appellee's children to receive survivors' annuities, there is no question that the Court of Claims below had both jurisdiction to entertain their claims and authority to grant recovery. See *United States* v. *Testan*, 424 U. S. 392, 397–398 (1976); *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 606–607, 372 F. 2d 1002, 1007–1009 (1967). In light of our holding, we need not address the Government's argument that the Court of Claims exceeded its jurisdiction when it declared 5 U. S. C. § 8341 (a)(3)(A)'s "lived with" requirement unconstitutional, severed that requirement from the statute, and awarded relief to the appellee's children based on the remaining language in the statute. Cf. *United States* v. *Testan, supra.*

(A)(ii). Because I agree that these children satisfy the statutory definition, I concur in the judgment of the Court. I write separately because I do not believe that the Court's broad construction of the "lived with" requirement is compatible with congressional intent or necessary to avoid constitutional difficulties.

The Court recognizes that the "lived with" requirement could serve governmental purposes by providing proof of either paternity or dependence. The Court concludes that the "lived with" requirement is not designed to prove paternity because the statute separately requires that an eligible illegitimate be a "recognized natural child." *Ante,* at 30. I agree.

I cannot accept so easily the Court's further conclusion that the "lived with" requirement was not designed to prove dependency. Although the 1966 amendment demonstrates that the "lived with" requirement cannot be interpreted to demand that more than one-half of a child's support come from the deceased parent, it does not demonstrate that Congress intended to eliminate entirely the dependency requirement. As a matter of statutory construction and common sense, the statement that an illegitimate who fulfills the "lived with" requirement need not meet an additional dependency requirement, *ante,* at 32, quoting H. R. Doc. No. 402, 89th Cong., 2d Sess., 41 (1966), indicates that Congress intended the "lived with" test to serve as the functional equivalent of a dependency requirement. The Court's assumption to the contrary deprives the "lived with" requirement of any legislative purpose. Rather than construe a statutory provision to serve no identifiable congressional goal, I would conclude that Congress intended the "lived with" requirement to serve as a means through which illegitimate children may prove actual dependency on the deceased parent.

Congress may require illegitimate children to demonstrate actual dependency even though legitimate children are presumed to be dependent, *Mathews* v. *Lucas,* 427 U. S. 495, 507–509 (1976), so long as the means by which illegitimates

must demonstrate such dependency are substantially related to achievement of the statutory goal. *Lalli* v. *Lalli*, 439 U. S. 259, 275–276 (1978) (opinion of POWELL, J.); see *Trimble* v. *Gordon*, 430 U. S. 762, 770–773 (1977). The possible constitutional infirmity in the Government's construction of the statute is its assumption that only illegitimates who "lived with" a parent at the time of his death were actually dependent. Such a requirement may be unconstitutionally restrictive because, as in this case, it would bar the claims of children who lived with their father for some part of their lives, and who received support from their father until his death.*

The recognition of the children's claim in this case clearly does not frustrate the congressional intent that only dependent illegitimate children receive survivors' annuities. I therefore would hold that children who show a continuing relationship of dependency with their father, which includes living with him in the past and receiving support from him when they lived apart, satisfy the requirement of 5 U. S. C. § 8341 (a)(3)(A)(ii). I do not believe, however, that the Court needs to find the requirement satisfied no matter when the child lived with the deceased parent. In some circumstances proof of a domestic living situation at some far distant period in the child's life may not demonstrate actual dependency. Accordingly, I would go no further than concluding that these children have satisfied the "lived with" requirement.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, dissenting.

I am in full agreement with the Court that the statutory question should have been resolved in this case prior to any application of the constitutional issue decided by the Court

*I believe that the Court errs in assuming that its broad interpretation of the "lived with" requirement will always avoid constitutional difficulty. The imposition of the "lived with" requirement as a test of actual dependency may be unconstitutional in a case in which a father had always supported, but never lived with, an illegitimate child.

of Claims in *Gentry* v. *United States*, 212 Ct. Cl. 1, 546 F. 2d 343 (1976). Nor do I disagree with the Court's construction of the statute in issue. I dissent, however, because I believe that the Court should remand the case to the Court of Claims for consideration of the statutory claim in the first instance.

Federal courts should not, of course, resolve cases on the basis of constitutional questions when a nonconstitutional ground might be available. A federal court also may not award relief on the basis of a constitutional decision absent jurisdiction conferred by Congress. When a federal court violates either of these prudential or jurisdictional limitations, our standard practice is to remand the case for consideration of the statutory question. In *Youakim* v. *Miller*, 425 U. S. 231 (1976), this Court found that a constitutional holding of a lower court might possibly be avoided by the construction of statutory requirements. The Court remanded, finding that the statutory issue might be dispositive, "but that the claim should be aired first in the District Court. Vacating the judgment and remanding the case for this purpose will require the District Court first to decide the statutory issue, . . . and if appellants prevail on that question, it will be unnecessary for either the District Court or this Court to reach the equal protection issue at all." *Id.*, at 236. See also *Wyman* v. *Rothstein*, 398 U. S. 275 (1970); *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129 (1946). In *Richardson* v. *Morris*, 409 U. S. 464 (1973), the District Court decided a constitutional question under an erroneous assumption of Tucker Act jurisdiction, and this Court found it necessary to remand the case so that the District Court could determine what other permissible grounds of decision may have been open to it.

The Court of Claims in this case was wrong in resolving this case on the basis of its constitutional holding, both as a matter of prudential considerations as well as jurisdiction. See *United States* v. *Testan*, 424 U. S. 392, 397–398 (1976). While the Court of Claims did have jurisdiction to entertain the statu-

tory question presented in this case, we should have permitted it the opportunity to exercise that jurisdiction. Only this Term, we remanded a case to the Court of Claims for consideration of an issue not resolved by that court. *Hatzlachh Supply Co.* v. *United States*, 444 U. S. 460 (1980). By remanding here, we would conform the disposition of this case to our customary practice which recognizes the usefulness of district and appellate court opinions on the questions ultimately reviewed here, as well as the need to reserve this Court's plenary consideration for questions still warranting final decision here after decision by another court.

# MASSACHUSETTS v. MEEHAN

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 78-1874. Argued January 9, 1980—Decided February 26, 1980

Certiorari dismissed. Reported below: 377 Mass. 552, 387 N. E. 2d 527.

*Barbara A. H. Smith*, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With her on the briefs were *Francis X. Bellotti*, Attorney General, and *Stephen R. Delinsky*, Assistant Attorney General.

*David A. Mills* argued the cause for respondent. With him on the brief was *Walter J. Hurley*.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

# TRAMMEL *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78-5705. Argued October 29, 30, 1979—Decided February 27, 1980

Prior to his trial with others on federal drug charges, petitioner advised the District Court that the Government intended to call his wife (who had been named in the indictment as an unindicted co-conspirator) as an adverse witness and asserted a privilege to prevent her from testifying. The District Court ruled that confidential communications between petitioner and his wife were privileged and therefore inadmissible, but the wife was permitted to testify to any act she observed before or during the marriage and to any communication made in the presence of a third person. Primarily on the basis of his wife's testimony, petitioner was convicted, and the Court of Appeals affirmed, rejecting petitioner's contention that the admission of his wife's adverse testimony, over his objection, contravened the decision in *Hawkins* v. *United States*, 358 U. S. 74, barring the testimony of one spouse against the other unless both consent.

*Held:* The Court modifies the *Hawkins* rule so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. Here, petitioner's spouse chose to testify against him; that she did so after a grant of immunity and assurances of lenient treatment does not render her testimony involuntary, and thus petitioner's claim of privilege was properly rejected. Pp. 43–53.

(a) The modern justification for the privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship. While this Court, in *Hawkins*, *supra*, reaffirmed the vitality of the common-law privilege in the federal courts, it made clear that its decision was not meant to "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'" 358 U. S., at 79. Pp. 43–46.

(b) Rule 501 of the Federal Rules of Evidence acknowledges the federal courts' authority to continue the evolutionary development of testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." P. 47.

(c) Since 1958, when *Hawkins* was decided, the trend in state law

has been toward divesting the accused of the privilege to bar adverse spousal testimony. Pp. 48–50.

(d) Information privately disclosed between husband and wife in the confidence of the marital relationship is privileged under the independent rule protecting confidential marital communications, *Blau* v. *United States*, 340 U. S. 332; and the *Hawkins* privilege, which sweeps more broadly than any other testimonial privilege, is not limited to confidential communications but is invoked to also exclude evidence of criminal acts and of communications in the presence of third persons. The ancient foundations for so sweeping a privilege—whereby a woman was regarded as a chattel and denied a separate legal identity—have long since disappeared, and the contemporary justification for affording an accused such a privilege is unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—there is probably little in the way of marital harmony for the privilege to preserve. Consideration of the foundations for the privilege and its history thus shows that "reason and experience" no longer justify so sweeping a rule as that found acceptable in *Hawkins*. Pp. 50–53.

583 F. 2d 1166, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 53.

*J. Terry Wiggins* argued the cause for petitioner. With him on the brief was *Frederick A. Fielder, Jr.*

*Solicitor General McCree* argued the cause for the United States. With him on the brief were *Assistant Attorney General Heymann, Deputy Solicitor General Frey, Elinor Hadley Stillman,* and *Joel M. Gershowitz.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether an accused may invoke the privilege against adverse spousal testimony so as

*Briefs of *amici curiae* were filed by *Frank E. Booker* for the Michigan Bar Association Standing Committee on Civil Procedure; and by *Mr. Booker* for the Missouri Bar.

to exclude the voluntary testimony of his wife. 440 U. S. 934 (1979). This calls for a re-examination of *Hawkins* v. *United States*, 358 U. S. 74 (1958).

## I

On March 10, 1976, petitioner Otis Trammel was indicted with two others, Edwin Lee Roberts and Joseph Freeman, for importing heroin into the United States from Thailand and the Philippine Islands and for conspiracy to import heroin in violation of 21 U. S. C. §§ 952 (a), 962 (a), and 963. The indictment also named six unindicted co-conspirators, including petitioner's wife Elizabeth Ann Trammel.

According to the indictment, petitioner and his wife flew from the Philippines to California in August 1975, carrying with them a quantity of heroin. Freeman and Roberts assisted them in its distribution. Elizabeth Trammel then traveled to Thailand where she purchased another supply of the drug. On November 3, 1975, with four ounces of heroin on her person, she boarded a plane for the United States. During a routine customs search in Hawaii, she was searched, the heroin was discovered, and she was arrested. After discussions with Drug Enforcement Administration agents, she agreed to cooperate with the Government.

Prior to trial on this indictment, petitioner moved to sever his case from that of Roberts and Freeman. He advised the court that the Government intended to call his wife as an adverse witness and asserted his claim to a privilege to prevent her from testifying against him. At a hearing on the motion, Mrs. Trammel was called as a Government witness under a grant of use immunity. She testified that she and petitioner were married in May 1975 and that they remained married.[1] She explained that her cooperation with the Government was based on assurances that she would be given

[1] In response to the question whether divorce was contemplated, Mrs. Trammel testified that her husband had said that "I would go my way and he would go his." App. 27.

lenient treatment.[2] She then described, in considerable detail, her role and that of her husband in the heroin distribution conspiracy.

After hearing this testimony, the District Court ruled that Mrs. Trammel could testify in support of the Government's case to any act she observed during the marriage and to any communication "made in the presence of a third person"; however, confidential communications between petitioner and his wife were held to be privileged and inadmissible. The motion to sever was denied.

At trial, Elizabeth Trammel testified within the limits of the court's pretrial ruling; her testimony, as the Government concedes, constituted virtually its entire case against petitioner. He was found guilty on both the substantive and conspiracy charges and sentenced to an indeterminate term of years pursuant to the Federal Youth Corrections Act, 18 U. S. C. § 5010 (b).[3]

In the Court of Appeals petitioner's only claim of error was that the admission of the adverse testimony of his wife, over his objection, contravened this Court's teaching in *Hawkins* v. *United States, supra,* and therefore constituted reversible error. The Court of Appeals rejected this contention. It concluded that *Hawkins* did not prohibit "the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the Government in return for her testimony." 583 F. 2d 1166, 1168 (CA10 1978).

## II

The privilege claimed by petitioner has ancient roots. Writing in 1628, Lord Coke observed that "it hath beene resolved

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[2] The Government represents to the Court that Elizabeth Trammel has not been prosecuted for her role in the conspiracy.

[3] Roberts and Freeman were also convicted. Roberts was sentenced to two years' imprisonment. Freeman received an indeterminate sentence under the Youth Corrections Act.

by the Justices that a wife cannot be produced either against or for her husband." 1 E. Coke, A Commentarie upon Littleton 6b (1628). See, generally, 8 J. Wigmore, Evidence § 2227 (McNaughton rev. 1961). This spousal disqualification sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two now long-abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.

Despite its medieval origins, this rule of spousal disqualification remained intact in most common-law jurisdictions well into the 19th century. See *id.*, § 2333. It was applied by this Court in *Stein* v. *Bowman*, 13 Pet. 209, 220–223 (1839), in *Graves* v. *United States*, 150 U. S. 118 (1893), and again in *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 195 (1920), where it was deemed so well established a proposition as to "hardly requir[e] mention." Indeed, it was not until 1933, in *Funk* v. *United States*, 290 U. S. 371, that this Court abolished the testimonial disqualification in the federal courts, so as to permit the spouse of a defendant to testify in the defendant's behalf. *Funk*, however, left undisturbed the rule that either spouse could prevent the other from giving adverse testimony. *Id.*, at 373. The rule thus evolved into one of privilege rather than one of absolute disqualification. See J. Maguire, Evidence, Common Sense and Common Law 78–92 (1947).

The modern justification for this privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship. Notwithstanding this benign purpose, the rule was sharply criticized.[4]

[4] See Brosman, Edward Livingston and Spousal Testimony in Louisiana, 11 Tulane L. Rev. 243 (1937); Hutchins & Slesinger, Some Observations

Professor Wigmore termed it "the merest anachronism in legal theory and an indefensible obstruction to truth in practice." 8 Wigmore § 2228, at 221. The Committee on Improvements in the Law of Evidence of the American Bar Association called for its abolition. 63 American Bar Association Reports 594–595 (1938). In its place, Wigmore and others suggested a privilege protecting only private marital communications, modeled on the privilege between priest and penitent, attorney and client, and physician and patient. See 8 Wigmore § 2332 *et seq.*[5]

These criticisms influenced the American Law Institute, which, in its 1942 Model Code of Evidence, advocated a privilege for marital confidences, but expressly rejected a rule vesting in the defendant the right to exclude all adverse testimony of his spouse. See American Law Institute, Model Code of Evidence, Rule 215 (1942). In 1953 the Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws, followed a similar course; it limited the privilege to confidential communications and "abolishe[d] the rule, still existing in some states, and largely a sentimental relic, of not requiring one spouse to testify against the other in a criminal action." See Rule 23 (2) and comments. Several state legislatures enacted similarly patterned provisions into law.[6]

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on the Law of Evidence: Family Relations, 13 Minn. L. Rev. 675 (1929); Note, 24 Calif. L. Rev. 472 (1936); Note, 35 Mich. L. Rev. 329 (1936); Note, 10 So. Cal. L. Rev. 94 (1936); Note, 20 Minn. L. Rev. 693 (1936).

[5] This Court recognized just such a confidential marital communications privilege in *Wolfle* v. *United States*, 291 U. S. 7 (1934), and in *Blau* v. *United States*, 340 U. S. 332 (1951). In neither case, however, did the Court adopt the Wigmore view that the communications privilege be substituted *in place of* the privilege against adverse spousal testimony. The privilege as to confidential marital communications is not at issue in the instant case; accordingly, our holding today does not disturb *Wolfle* and *Blau*.

[6] See Note, Competency of One Spouse to Testify Against the Other in

In *Hawkins* v. *United States*, 358 U. S. 74 (1958), this Court considered the continued vitality of the privilege against adverse spousal testimony in the federal courts. There the District Court had permitted petitioner's wife, over his objection, to testify against him. With one questioning concurring opinion, the Court held the wife's testimony inadmissible; it took note of the critical comments that the common-law rule had engendered, *id.*, at 76, and n. 4, but chose not to abandon it. Also rejected was the Government's suggestion that the Court modify the privilege by vesting it in the witness-spouse, with freedom to testify or not independent of the defendant's control. The Court viewed this proposed modification as antithetical to the widespread belief, evidenced in the rules then in effect in a majority of the States and in England, "that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences." *Id.*, at 79.

*Hawkins*, then, left the federal privilege for adverse spousal testimony where it found it, continuing "a rule which bars the testimony of one spouse against the other unless both consent." *Id.*, at 78. Accord, *Wyatt* v. *United States*, 362 U. S. 525, 528 (1960).[7] However, in so doing, the Court made clear that its decision was not meant to "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'" 358 U. S., at 79.

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Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend, 38 Va. L. Rev. 359 (1952).

[7] The decision in *Wyatt* recognized an exception to *Hawkins* for cases in which one spouse commits a crime against the other. 362 U. S., at 526. This exception, placed on the ground of necessity, was a long-standing one at common law. See *Lord Audley's Case*, 123 Eng. Rep. 1140 (1631); 8 Wigmore § 2239. It has been expanded since then to include crimes against the spouse's property, see *Herman* v. *United States*, 220 F. 2d 219, 226 (CA4 1955), and in recent years crimes against children of either spouse, *United States* v. *Allery*, 526 F. 2d 1362 (CA8 1975). Similar exceptions have been found to the confidential marital communications privilege. See 8 Wigmore § 2338.

## III

### A

The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Fed. Rule Evid. 501. Cf. *Wolfle* v. *United States*, 291 U. S. 7, 12 (1934). The general mandate of Rule 501 was substituted by the Congress for a set of privilege rules drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by this Court. That proposal defined nine specific privileges, including a husband-wife privilege which would have codified the *Hawkins* rule and eliminated the privilege for confidential marital communications. See proposed Fed. Rule Evid. 505. In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis," 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate), and to leave the door open to change. See also S. Rep. No. 93–1277, p. 11 (1974); H. R. Rep. No. 93–650, p. 8 (1973).[8]

Although Rule 501 confirms the authority of the federal courts to reconsider the continued validity of the *Hawkins*

[8] Petitioner's reliance on 28 U. S. C. § 2076 for the proposition that this Court is without power to reconsider *Hawkins* is ill-founded. That provision limits this Court's *statutory* rulemaking authority by providing that rules "creating, abolishing, or modifying a privilege shall have no force or effect unless . . . approved by act of Congress." It was enacted principally to insure that state rules of privilege would apply in diversity jurisdiction cases unless Congress authorized otherwise. In Rule 501 Congress makes clear that § 2076 was not intended to prevent the federal courts from developing testimonial privilege law in federal criminal cases on a case-by-case basis "in light of reason and experience"; indeed Congress encouraged such development.

rule, the long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships—already subject to much erosion in our day—also counsels caution. At the same time, we cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change. This was recognized in *Funk* where the Court "decline[d] to enforce . . . ancient rule[s] of the common law under conditions as they now exist." 290 U. S., at 382. For, as Mr. Justice Black admonished in another setting, "[w]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it." *Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 471 (1948) (dissenting opinion).

B

Since 1958, when *Hawkins* was decided, support for the privilege against adverse spousal testimony has been eroded further. Thirty-one jurisdictions, including Alaska and Hawaii, then allowed an accused a privilege to prevent adverse spousal testimony. 358 U. S., at 81, n. 3 (STEWART, J., concurring). The number has now declined to 24.[9] In 1974, the National

[9] Eight States provide that one spouse is incompetent to testify against the other in a criminal proceeding: see Haw. Rev. Stat. § 621–18 (1976); Iowa Code § 622.7 (1979); Miss. Code Ann. § 13–1–5 (Supp. 1979); N. C. Gen. Stat. § 8–57 (Supp. 1977); Ohio Rev. Code Ann. § 2945.42 (Supp. 1979); Pa. Stat. Ann., Tit. 42, §§ 5913, 5915 (Purdon Supp. 1979); Tex. Crim. Proc. Code Ann., Art. 38.11 (Vernon 1979); Wyo. Stat. § 1–12–104 (1977).

Sixteen States provide a privilege against adverse spousal testimony and vest the privilege in both spouses or in the defendant-spouse alone: see Alaska Crim. Proc. Rule 26 (b)(2); Colo. Rev. Stat. § 13–90–107 (1973); Idaho Code § 9–203 (Supp. 1979); Mich. Comp. Laws § 600.2162 (1968); Minn. Stat. § 595.02 (1978); Mo. Rev. Stat. § 546.260 (1978); Mont. Code Ann. § 46–16–212 (1979); Neb. Rev. Stat. § 27–505 (1975); Nev. Rev. Stat. § 49.295 (1977); N. J. Stat. Ann. § 2A:84A–17 (West 1976); N. M. Stat. Ann. § 20–4–505 (Supp. 1977); Ore. Rev. Stat. § 44.040

Conference on Uniform State Laws revised its Uniform Rules of Evidence, but again rejected the *Hawkins* rule in favor of a limited privilege for confidential communications. See Uniform Rules of Evidence, Rule 504. That proposed rule has been enacted in Arkansas, North Dakota, and Oklahoma—each of which in 1958 permitted an accused to exclude adverse spousal testimony.[10] The trend in state law toward

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(1977); Utah Code Ann. § 78–24–8 (1977); Va. Code § 19.2–271.2 (Supp. 1979); Wash. Rev. Code § 5.60.060 (Supp. 1979); W. Va. Code § 57–3–3 (1966).

Nine States entitle the witness-spouse alone to assert a privilege against adverse spousal testimony: see Ala. Code § 12–21–227 (1975); Cal. Evid. Code Ann. §§ 970–973 (West 1966 and Supp. 1979); Conn. Gen. Stat. § 54–84 (1979); Ga. Code § 38–1604 (1978); Ky. Rev. Stat. § 421.210 (Supp. 1978); La. Rev. Stat. Ann. § 15:461 (West 1967); Md. Cts. & Jud. Proc. Code Ann. §§ 9–101, 9–106 (1974); Mass. Gen. Laws Ann., ch. 233, § 20 (West Supp. 1979); R. I. Gen. Laws § 12–17–10 (1970).

The remaining 17 States have abolished the privilege in criminal cases: see Ariz. Rev. Stat. Ann. § 12–2231 (Supp. 1978); Ark. Stat. Ann. § 28–101, Rules 501 and 504 (1979); Del. Code Ann., Tit. 11, § 3502 (1975); Fla. Stat. §§ 90.501, 90.504 (1979); Ill. Rev. Stat., ch. 38, § 155–1 (1977); Ind. Code §§ 34–1–14–4, 34–1–14–5 (1976); Kan. Stat. Ann. §§ 60–407, 60–428 (1976); Maine Rules of Evidence 501, 504; N. H. Rev. Stat. Ann. § 516.27 (1974); N. Y. Crim. Proc. Law § 60.10 (McKinney 1971); N. Y. Civ. Proc. Law §§ 4502, 4512 (McKinney 1963); N. D. Rules of Evidence 501, 504; Okla. Stat., Tit. 12, §§ 2103, 2501, 2504 (West Supp. 1979); S. C. Code § 19–11–30 (1976); S. D. Comp. Laws Ann. §§ 19–13–1, 19–13–12 to 19–13–15 (1979); Tenn. Code Ann. § 40–2404 (1975); Vt. Stat. Ann., Tit. 12, § 1605 (1973); Wis. Stat. §§ 905.01, 905.05 (1975).

In 1901, Congress enacted a rule of evidence for the District of Columbia that made husband and wife "competent but not compellable to testify for or against each other," except as to confidential communications. This provision, which vests the privilege against adverse spousal testimony in the witness-spouse, remains in effect. See 31 Stat. 1358, §§ 1068, 1069, recodified as D. C. Code § 14–306 (1973).

[10] In 1965, California took the privilege from the defendant-spouse and vested it in the witness-spouse, accepting a study commission recommendation that the "latter [was] more likely than the former to determine whether or not to claim the privilege on the basis of the probable effect on the marital relationship." See Cal. Evid. Code Ann. §§ 970–973 (West

divesting the accused of the privilege to bar adverse spousal testimony has special relevance because the laws of marriage and domestic relations are concerns traditionally reserved to the states. See *Sosna* v. *Iowa*, 419 U. S. 393, 404 (1975). Scholarly criticism of the *Hawkins* rule has also continued unabated.[11]

C

Testimonial exclusionary rules and privileges contravene the fundamental principle that " 'the public . . . has a right to every man's evidence.' " *United States* v. *Bryan*, 339 U. S. 323, 331 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins* v. *United States*, 364 U. S. 206, 234 (1960) (Frankfurter, J., dissenting). Accord, *United States* v. *Nixon*, 418 U. S. 683,

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1966 and Supp. 1979) and 1 California Law Revision Commission, Recommendation and Study relating to The Marital "For and Against" Testimonial Privilege, at F–5 (1956). See also 6 California Law Revision Commission, Tentative Privileges Recommendation—Rule 27.5, pp. 243–244 (1964).

Support for the common-law rule has also diminished in England. In 1972, a study group there proposed giving the privilege to the witness-spouse, on the ground that "if [the wife] is willing to give evidence . . . the law would be showing excessive concern for the preservation of marital harmony if it were to say that she must not do so." Criminal Law Revision Committee, Eleventh Report, Evidence (General) 93.

[11] See Reutlinger, Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege, 61 Calif. L. Rev. 1353, 1384–1385 (1973); Orfield, The Husband-Wife Privileges in Federal Criminal Procedure, 24 Ohio St. L. J. 144 (1963); Rothstein, A Re-evaluation of the Privilege Against Adverse Spousal Testimony in the Light of its Purpose, 12 Int'l and Comp. L. Q. 1189 (1963); Note, 1977 Ariz. St. L. J. 411; Comment, 17 St. Louis L. J. 107 (1972); Comment, 15 Wayne L. Rev. 1287, 1334–1337 (1969); Comment, 52 J. Crim. L. 74 (1961); Note, 56 Nw. U. L. Rev. 208 (1961); Note, 32 Temp. L. Q. 351 (1959); Note, 33 Tulane L. Rev. 884 (1959).

709–710 (1974). Here we must decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice.

It is essential to remember that the *Hawkins* privilege is not needed to protect information privately disclosed between husband and wife in the confidence of the marital relationship—once described by this Court as "the best solace of human existence." *Stein* v. *Bowman*, 13 Pet., at 223. Those confidences are privileged under the independent rule protecting confidential marital communications. *Blau* v. *United States*, 340 U. S. 332 (1951); see n. 5, *supra*. The *Hawkins* privilege is invoked, not to exclude private marital communications, but rather to exclude evidence of criminal acts and of communications made in the presence of third persons.

No other testimonial privilege sweeps so broadly. The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.

The *Hawkins* rule stands in marked contrast to these three privileges. Its protection is not limited to confidential communications; rather it permits an accused to exclude all adverse spousal testimony. As Jeremy Bentham observed more than a century and a half ago, such a privilege goes far beyond making "every man's house his castle," and permits a person

to convert his house into "a den of thieves." 5 Rationale of Judicial Evidence 340 (1827). It "secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime." *Id.*, at 338.

The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside so that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton* v. *Stanton*, 421 U. S. 7, 14–15 (1975).

The contemporary justification for affording an accused such a privilege is also unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.[12] Indeed, there is reason to believe that vesting the privilege in the accused could actually undermine the marital relationship. For example, in a case such as this, the Government is unlikely to offer a wife immunity and lenient treatment if it knows that her husband can prevent her from giving adverse testimony. If the Government is dissuaded from making such an offer, the privilege can have the untoward effect of permitting one

[12] It is argued that abolishing the privilege will permit the Government to come between husband and wife, pitting one against the other. That, too, misses the mark. Neither *Hawkins*, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited.

spouse to escape justice at the expense of the other. It hardly seems conducive to the preservation of the marital relation to place a wife in jeopardy solely by virtue of her husband's control over her testimony.

## IV

Our consideration of the foundations for the privilege and its history satisfy us that "reason and experience" no longer justify so sweeping a rule as that found acceptable by the Court in *Hawkins*. Accordingly, we conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification—vesting the privilege in the witness-spouse—furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.

Here, petitioner's spouse chose to testify against him. That she did so after a grant of immunity and assurances of lenient treatment does not render her testimony involuntary. Cf. *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978). Accordingly, the District Court and the Court of Appeals were correct in rejecting petitioner's claim of privilege, and the judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE STEWART, concurring in the judgment.

Although agreeing with much of what the Court has to say, I cannot join an opinion that implies that "reason and experience" have worked a vast change since the *Hawkins* case was decided in 1958. In that case the Court upheld the privilege of a defendant in a criminal case to prevent adverse spousal testimony, in an all-but-unanimous opinion by Mr. Justice Black. Today the Court, in another all-but-unanimous opinion, obliterates that privilege because of the pur-

ported change in perception that "reason and experience" have wrought.

The fact of the matter is that the Court in this case simply accepts the very same arguments that the Court rejected when the Government first made them in the *Hawkins* case in 1958. I thought those arguments were valid then,[1] and I think so now.

The Court is correct when it says that "[t]he ancient foundations for so sweeping a privilege have long since disappeared." *Ante*, at 52. But those foundations had disappeared well before 1958; their disappearance certainly did not occur in the few years that have elapsed between the *Hawkins* decision and this one. To paraphrase what Mr. Justice Jackson once said in another context, there is reason to believe that today's opinion of the Court will be of greater interest to students of human psychology than to students of law.[2]

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[1] "The rule of evidence we are here asked to re-examine has been called a 'sentimental relic.' It was born of two concepts long since rejected: that a criminal defendant was incompetent to testify in his own case, and that in law husband and wife were one. What thus began as a disqualification of either spouse from testifying at all yielded gradually to the policy of admitting all relevant evidence, until it has now become simply a privilege of the criminal defendant to prevent his spouse from testifying against him.

"Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. When such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny. Surely 'reason and experience' require that we do more than indulge in mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquillity." *Hawkins* v. *United States*, 358 U. S. 74, 81–82 (concurring opinion) (citations and footnotes omitted).

[2] See *Zorach* v. *Clauson*, 343 U. S. 306, 325 (dissenting opinion).

# LEWIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78–1595. Argued January 7, 1980—Decided February 27, 1980

*Held:* Even though petitioner's extant prior state-court felony conviction may be subject to collateral attack under *Gideon* v. *Wainwright*, 372 U. S. 335, it could properly be used as a predicate for his subsequent conviction for possession of a firearm in violation of § 1202 (a)(1) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. Pp. 60–68.

(a) The plain meaning of § 1202 (a)(1)'s sweeping language proscribing the possession of firearms by any person who "has been convicted by a court of the United States or of a State . . . of a felony," is that the fact of a felony conviction imposes firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action. Other provisions of the statute demonstrate and reinforce its broad sweep, and there is nothing in § 1202 (a)(1)'s legislative history to suggest that Congress was willing to allow a defendant to question the validity of his prior conviction as a defense to a charge under § 1202 (a)(1). Moreover, the fact that there are remedies available to a convicted felon—removal of the firearm disability by a qualifying pardon or the Secretary of the Treasury's consent, as specified in the Act, or a challenge to the prior conviction in an appropriate court proceeding—suggests that Congress intended that the defendant clear his status *before* obtaining a firearm, thereby fulfilling Congress' purpose to keep firearms away from persons classified as potentially irresponsible and dangerous. Pp. 60–65.

(b) The firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment, since Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm. And use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by criminal sanction, is not inconsistent with *Burgett* v. *Texas*, 389 U. S. 109; *United States* v. *Tucker*, 404 U. S. 443; and *Loper* v. *Beto*, 405 U. S. 473. Pp. 65–67.

591 F. 2d 978, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and POWELL, JJ., joined, *post*, p. 68.

*Andrew W. Wood* argued the cause for petitioner. With him on the briefs was *Neal P. Rutledge*.

*Andrew J. Levander* argued the cause *pro hac vice* for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Frey, Jerome M. Feit,* and *Joel M. Gershowitz.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether a defendant's extant prior conviction, flawed because he was without counsel, as required by *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), may constitute the predicate for a subsequent conviction under § 1202 (a)(1), as amended, of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. App. § 1202 (a)(1).[1]

## I

In 1961, petitioner George Calvin Lewis, Jr., upon his plea of guilty, was convicted in a Florida state court of a felony

[1] Section 1202 (a) reads in full:

"Any person who—

"(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

"(2) has been discharged from the Armed Forces under dishonorable conditions, or

"(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

"(4) having been a citizen of the United States has renounced his citizenship, or

"(5) being an alien is illegally or unlawfully in the United States,

"and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

for breaking and entering with intent to commit a misdemeanor. See Fla. Stat. § 810.05 (1961). He served a term of imprisonment. That conviction has never been overturned, nor has petitioner ever received a qualifying pardon or permission from the Secretary of the Treasury to possess a firearm. See 18 U. S. C. App. § 1203 (2) and 18 U. S. C. § 925 (c).

In January 1977, Lewis, on probable cause, was arrested in Virginia, and later was charged by indictment with having knowingly received and possessed at that time a specified firearm, in violation of 18 U. S. C. App. § 1202 (a)(1).[2] He waived a jury and was given a bench trial. It was stipulated that the weapon in question had been shipped in interstate commerce. The Government introduced in evidence an exemplified copy of the judgment and sentence in the 1961 Florida felony proceeding. App. 10.

Shortly before the trial, petitioner's counsel informed the court that he had been advised that Lewis was not represented by counsel in the 1961 Florida proceeding.[3] He claimed that under *Gideon* v. *Wainwright, supra,* a violation of § 1202

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[2] The indictment also charged petitioner with a violation of 18 U. S. C. § 922 (h)(1). That statute reads in pertinent part:

"It shall be unlawful for any person—

"(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . . .

"to receive any firearm . . . which has been shipped or transported in interstate . . . commerce."

Petitioner was acquitted on the § 922 (h)(1) charge and it is not before us here.

[3] Petitioner's counsel stated that a Florida attorney had advised him that the court records in that State showed affirmatively that Lewis had no lawyer. He noted also that Lewis had been charged with the same offense as had the defendant in *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), and that petitioner had been tried in the same State about six months before Gideon was tried. App. 2–3.

(a)(1) could not be predicated on a prior conviction obtained in violation of petitioner's Sixth and Fourteenth Amendment rights. The court rejected that claim, ruling that the constitutionality of the outstanding Florida conviction was immaterial with respect to petitioner's status under § 1202 (a)(1) as a previously convicted felon at the time of his arrest. Petitioner, accordingly, offered no evidence as to whether in fact he had been convicted in 1961 without the aid of counsel. We therefore assume, for present purposes, that he was without counsel at that time.

On appeal, the United States Court of Appeals for the Fourth Circuit, by a divided vote, affirmed. 591 F. 2d 978 (1979). It held that a defendant, purely as a defense to a prosecution under § 1202 (a)(1), could not attack collaterally an outstanding prior felony conviction, and that the statutory prohibition applied irrespective of whether that prior conviction was subject to collateral attack. The Court of Appeals also rejected Lewis' constitutional argument to the effect that the use of the prior conviction as a predicate for his prosecution under § 1202 (a)(1) violated his rights under the Fifth and Sixth Amendments.

Because of conflict among the Courts of Appeals,[4] we granted certiorari. 442 U. S. 939 (1979).

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[4] Compare *United States* v. *Lufman*, 457 F. 2d 165 (CA7 1972) (use of an underlying felony conviction unconstitutionally obtained to support a conviction under § 1202 (a)(1) is reversible error), with the Fourth Circuit's ruling in the present case, and with *United States* v. *Maggard*, 573 F. 2d 926 (CA6 1978); and *United States* v. *Graves*, 554 F. 2d 65 (CA3 1977) (en banc) (claim of constitutional error in the underlying conviction may not be raised). The Ninth Circuit has distinguished between a claim of constitutional invalidity in the underlying conviction, which it has held may be raised, and a claim that the underlying conviction has been, or should be, reversed on other grounds. Compare *United States* v. *O'Neal*, 545 F. 2d 85 (1976), and *United States* v. *Pricepaul*, 540 F. 2d 417 (1976), with *United States* v. *Liles*, 432 F. 2d 18 (1970). See also *United States* v. *Herrell*, 588 F. 2d 711 (CA9 1978), cert. denied, 440

## II

Four cases decided by this Court provide the focus for petitioner's attack upon his conviction. The first, and pivotal one, is *Gideon* v. *Wainwright, supra,* where the Court held that a state felony conviction without counsel, and without a valid waiver of counsel, was unconstitutional under the Sixth and Fourteenth Amendments. That ruling is fully retroactive. *Kitchens* v. *Smith,* 401 U. S. 847 (1971).

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U. S. 964 (1979) (underlying conviction in a prosecution under 18 U. S. C. § 922 (h)(1) may not be challenged on nonconstitutional grounds).

The identical issue that is presented in this case has also arisen in the context of challenges to convictions under 18 U. S. C. § 922 (g)(1) (proscribing shipping or transport of a firearm in interstate or foreign commerce by a person under indictment for, or convicted of, a felony) and § 922 (h)(1) (proscribing receipt of a firearm shipped in interstate or foreign commerce by such a person). Compare *United States* v. *Scales,* 599 F. 2d 78 (CA5 1979); *Dameron* v. *United States,* 488 F. 2d 724 (CA5 1974); *Pasterchik* v. *United States,* 466 F. 2d 1367 (CA9 1972); and *United States* v. *DuShane,* 435 F. 2d 187 (CA2 1970) (underlying conviction may be attacked as unconstitutional), with *Barker* v. *United States,* 579 F. 2d 1219, 1226 (CA10 1978) (underlying conviction may not be so challenged in prosecution under § 922 (h)(1)).

The Courts of Appeals have treated the issue somewhat differently in prosecutions under 18 U. S. C. § 922 (a)(6) (prohibiting the falsification of one's status as a convicted felon in purchasing a firearm). Nonuniformity has prevailed nonetheless on the question whether a defendant charged with violating that statute may challenge the constitutionality of the underlying felony conviction. Compare *United States* v. *O'Neal, supra,* and *United States* v. *Pricepaul, supra* (permitting the challenge), with *United States* v. *Allen,* 556 F. 2d 720 (CA4 1977); *United States* v. *Graves, supra;* and *Cassity* v. *United States,* 521 F. 2d 1320 (CA6 1975) (holding that the challenge may not be made). The Eighth Circuit has stated that it will not permit a challenge to the constitutionality of the underlying conviction where the defendant is charged under § 922 (a)(6), while reserving the question under § 1202 (a)(1) and §§ 922 (g)(1) and (h)(1). *United States* v. *Edwards,* 568 F. 2d 68, 70–72, and n. 3 (1977). See also *United States* v. *Graves,* 554 F. 2d, at 83–88 (Garth, J., and Seitz, C. J., concurring in part and dissenting in part) (the Government need not prove the validity of the underlying conviction in a prosecution brought under § 922 (a)(6), but it must do so in a prosecution under § 1202 (a)(1)).

The second case is *Burgett* v. *Texas*, 389 U. S. 109 (1967). There the Court held that a conviction invalid under *Gideon* could not be used for enhancement of punishment under a State's recidivist statute. The third is *United States* v. *Tucker*, 404 U. S. 443 (1972), where it was held that such a conviction could not be considered by a court in sentencing a defendant after a subsequent conviction. And the fourth is *Loper* v. *Beto*, 405 U. S. 473 (1972), where the Court disallowed the use of the conviction to impeach the general credibility of the defendant. The prior conviction, the plurality opinion said, "lacked reliability." *Id.*, at 484, quoting *Linkletter* v. *Walker*, 381 U. S. 618, 639, and n. 20 (1965).

We, of course, accept these rulings for purposes of the present case. Petitioner's position, however, is that the four cases require a reversal of his conviction under § 1202 (a)(1) on both statutory and constitutional grounds.

## III

The Court has stated repeatedly of late that in any case concerning the interpretation of a statute the "starting point" must be the language of the statute itself. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). See also *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979); *Southeastern Community College* v. *Davis*, 442 U. S. 397, 405 (1979). An examination of § 1202 (a)(1) reveals that its proscription is directed unambiguously at any person who "has been convicted by a court of the United States or of a State . . . of a felony." No modifier is present, and nothing suggests any restriction on the scope of the term "convicted." "Nothing on the face of the statute suggests a congressional intent to limit its coverage to persons [whose convictions are not subject to collateral attack]." *United States* v. *Culbert*, 435 U. S. 371, 373 (1978); see *United States* v. *Naftalin*, 441 U. S. 768, 772 (1979). The statutory language is sweeping, and its plain meaning is that the fact of a felony conviction imposes a firearm disability until the conviction is vacated or the felon is

relieved of his disability by some affirmative action, such as a qualifying pardon or a consent from the Secretary of the Treasury.[5] The obvious breadth of the language may well reflect the expansive legislative approach revealed by Congress' express findings and declarations, in 18 U. S. C. App. § 1201,[6] concerning the problem of firearm abuse by felons and certain specifically described persons.

Other provisions of the statute demonstrate and reinforce its broad sweep. Section 1203 enumerates exceptions to

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[5] One might argue, of course, that the language is so sweeping that it includes in its proscription even a person whose predicate conviction in the interim had been finally reversed on appeal and thus no longer was outstanding. The Government, however, does not go so far, Tr. of Oral Arg. 29–30, 37–40, and though we have no need to pursue that extreme argument in this case, we reject it. We are not persuaded that the mere possibility of making that argument renders the statute, as petitioner suggests, unconstitutionally vague. And unlike the dissent, *post*, at 69, we view the language Congress chose as consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated.

We note, nonetheless, that the disability effected by § 1202 (a)(1) would apply while a felony conviction was pending on appeal. See Note, Prior Convictions and the Gun Control Act of 1968, 76 Colum. L. Rev. 326, 334, and n. 42 (1976).

[6] "The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—.

"(1) a burden on commerce or threat affecting the free flow of commerce,

"(2) a threat to the safety of the President of the United States and Vice President of the United States,

"(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

"(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution."

§ 1202 (a)(1) (a prison inmate who by reason of his duties has expressly been entrusted with a firearm by prison authority; a person who has been pardoned and who has expressly been authorized to receive, possess, or transport a firearm). In addition, § 1202 (c)(2) defines "felony" to exclude certain state crimes punishable by no more than two years' imprisonment. No exception, however, is made for a person whose outstanding felony conviction ultimately might turn out to be invalid for any reason. On its face, therefore, § 1202 (a)(1) contains nothing by way of restrictive language. It thus stands in contrast with other federal statutes that explicitly permit a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony. See, *e. g.*, 18 U. S. C. § 3575 (e) (dangerous special offender) and 21 U. S. C. § 851 (c)(2) (recidivism under the Comprehensive Drug Abuse Prevention and Control Act of 1970).

When we turn to the legislative history of § 1202 (a)(1), we find nothing to suggest that Congress was willing to allow a defendant to question the validity of his prior conviction as a defense to a charge under § 1202 (a)(1). The section was enacted as part of Title VII of the Omnibus Crime Control and Safe Streets Acts of 1968, 82 Stat. 236. It was added by way of a floor amendment to the Act and thus was not a subject of discussion in the legislative reports. See *United States* v. *Batchelder*, 442 U. S. 114, 120 (1979); *Scarborough* v. *United States*, 431 U. S. 563, 569–570 (1977); *United States* v. *Bass*, 404 U. S. 336, 344, and n. 11 (1971). What little legislative history there is that is relevant reflects an intent to impose a firearms disability on any felon based on the fact of conviction. Senator Long, who introduced and directed the passage of Title VII, repeatedly stressed *conviction*, not a "valid" conviction, and not a conviction not subject to constitutional challenge, as the criterion. For example, the Senator observed:

"So, under Title VII, every citizen could possess a gun

> until the commission of his first felony. Upon his conviction, however, Title VII would deny every assassin, murderer, thief and burglar of the right to possess a firearm in the future except where he has been pardoned by the President or a State Governor and had been expressedly authorized by his pardon to possess a firearm." 114 Cong. Rec. 14773 (1968).

See also *id.*, at 13868, 14774. Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight. *Simpson* v. *United States*, 435 U. S. 6, 13 (1978).

It is not without significance, furthermore, that Title VII, as well as Title IV of the Omnibus Act, was enacted in response to the precipitous rise in political assassinations, riots, and other violent crimes involving firearms, that occurred in this country in the 1960's. See, *e. g.*, S. Rep. No. 1097, 90th Cong., 2d Sess., 76–78 (1968); H. R. Rep. No. 1577, 90th Cong., 2d Sess., 7 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess., 22–23 (1968). This Court, accordingly, has observed:

> "The legislative history [of Title VII] in its entirety, while brief, further supports the view that Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Scarborough* v. *United States*, 431 U. S., at 572.

The legislative history, therefore, affords no basis for a loophole, by way of a collateral constitutional challenge, to the broad statutory scheme enacted by Congress. Section 1202 (a) was a sweeping prophylaxis, in simple terms, against misuse of firearms. There is no indication of any intent to require the Government to prove the validity of the predicate conviction.

The very structure of the Omnibus Act's Title IV, enacted

simultaneously with Title VII, reinforces this conclusion. Each Title prohibits categories of presumptively dangerous persons from transporting or receiving firearms. See 18 U. S. C. §§ 922 (g) and (h). Actually, with regard to the statutory question at issue here, we detect little significant difference between Title IV and Title VII. Each seeks to keep a firearm away from "any person . . . who has been convicted" of a felony, although the definition of "felony" differs somewhat in the respective statutes. But to limit the scope of §§ 922 (g)(1) and (h)(1) to a validly convicted felon would be at odds with the statutory scheme as a whole. Those sections impose a disability not only on a convicted felon but also on a person under a felony indictment, even if that person subsequently is acquitted of the felony charge. Since the fact of mere indictment is a disabling circumstance, *a fortiori* the much more significant fact of conviction must deprive the person of a right to a firearm.

Finally, it is important to note that a convicted felon is not without relief. As has been observed above, the Omnibus Act, in §§ 1203 (2) and 925 (c), states that the disability may be removed by a qualifying pardon or the Secretary's consent. Also, petitioner, before obtaining his firearm, could have challenged his prior conviction in an appropriate proceeding in the Florida state courts. See Fla. Const., Art. 5, § 5 (3); *L'Hommedieu* v. *State*, 362 So. 2d 72 (Fla. App. 1978); *Weir* v. *State*, 319 So. 2d 80 (Fla. App. 1975). See also *United States* v. *Morgan*, 346 U. S. 502 (1954).[7]

It seems fully apparent to us that the existence of these remedies, two of which are expressly contained in the Omnibus Act itself, suggests that Congress clearly intended that the defendant clear his status *before* obtaining a firearm, thereby fulfilling Congress' purpose "broadly to keep firearms away

[7] This being so, § 1202 (a)(1) does not attach "what may amount to lifelong sanctions to a mere finding of probable cause," as has been argued by one commentator. See Comment, 92 Harv. L. Rev. 1790, 1795 (1979).

from the persons Congress classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, 423 U. S. 212, 218 (1976).

With the face of the statute and the legislative history so clear, petitioner's argument that the statute nevertheless should be construed so as to avoid a constitutional issue is inapposite. That course is appropriate only when the statute provides a fair alternative construction. This statute could not be more plain. *Swain* v. *Pressley*, 430 U. S. 372, 378, and n. 11 (1977); *United States* v. *Batchelder*, 442 U. S., at 122–123. Similarly, any principle of lenity, see *Rewis* v. *United States*, 401 U. S. 808, 812 (1971), has no application. The touchstone of that principle is statutory ambiguity. *Huddleston* v. *United States*, 415 U. S. 814, 832 (1974); *United States* v. *Batchelder*, 442 U. S., at 121–122. There is no ambiguity here.

We therefore hold that § 1202 (a)(1) prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds.

## IV

The firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment if there is "some 'rational basis' for the statutory distinctions made . . . or . . . they 'have some relevance to the purpose for which the classification is made.'" *Marshall* v. *United States*, 414 U. S. 417, 422 (1974), quoting from *McGinnis* v. *Royster*, 410 U. S. 263, 270 (1973), and *Baxstrom* v. *Herold*, 383 U. S. 107, 111 (1966). See *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979).[8]

[8] These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States* v. *Miller*, 307 U. S. 174, 178 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the

Section 1202 (a)(1) clearly meets that test. Congress, as its expressed purpose in enacting Title VII reveals, 18 U. S. C. App. § 1201, was concerned that the receipt and possession of a firearm by a felon constitutes a threat, among other things, to the continued and effective operation of the Government of the United States. The legislative history of the gun control laws discloses Congress' worry about the easy availability of firearms, especially to those persons who pose a threat to community peace. And Congress focused on the nexus between violent crime and the possession of a firearm by any person with a criminal record. 114 Cong. Rec. 13220 (1968) (remarks of Sen. Tydings); *id.*, at 16298 (remarks of Rep. Pollock). Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm. See, *e. g.*, *United States* v. *Ransom*, 515 F. 2d 885, 891–892 (CA5 1975), cert. denied, 424 U. S. 944 (1976). This Court has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm. See *Richardson* v. *Ramirez*, 418 U. S. 24 (1974) (disenfranchisement); *De Veau* v. *Braisted*, 363 U. S. 144 (1960) (proscription against holding office in a waterfront labor organization); *Hawker* v. *New York*, 170 U. S. 189 (1898) (prohibition against the practice of medicine).

We recognize, of course, that under the Sixth Amendment an uncounseled felony conviction cannot be used for certain purposes. See *Burgett*, *Tucker*, and *Loper*, all *supra*. The Court, however, has never suggested that an uncounseled con-

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preservation or efficiency of a well regulated militia"); *United States* v. *Three Winchester 30–30 Caliber Lever Action Carbines*, 504 F. 2d 1288, 1290, n. 5 (CA7 1974); *United States* v. *Johnson*, 497 F. 2d 548 (CA4 1974); *Cody* v. *United States*, 460 F. 2d 34 (CA8), cert. denied, 409 U. S. 1010 (1972) (the latter three cases holding, respectively, that § 1202 (a)(1), § 922 (g), and § 922 (a)(6) do not violate the Second Amendment).

viction is invalid for all purposes. See *Scott* v. *Illinois*, 440 U. S. 367 (1979); *Loper* v. *Beto*, 405 U. S., at 482. n. 11 (plurality opinion).

Use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction, is not inconsistent with *Burgett*, *Tucker*, and *Loper*. In each of those cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational.[9] Enforcement of that essentially civil disability through a criminal sanction does not "support guilt or enhance punishment." see *Burgett*, 389 U. S., at 115, on the basis of a conviction that is unreliable when one considers Congress' broad purpose. Moreover, unlike the situation in *Burgett*, the sanction imposed by § 1202 (a)(1) attaches immediately upon the defendant's first conviction.

Again, it is important to note that a convicted felon may challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm. We simply hold today that the firearms prosecution does not open the predicate conviction to a new form of collateral attack. See Note, Prior Convictions and the Gun Control Act of 1968,

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[9] The dissent's assertion that Congress' judgment in this regard cannot rationally be supported, *post*, at 72, is one we do not share. Moreover, such an assertion seems plainly inconsistent with the deference that a reviewing court should give to a legislative determination that, in essence, predicts a potential for future criminal behavior.

76 Colum. L. Rev. 326, 338–339 (1976). Cf. *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967).

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE POWELL join, dissenting.

In disagreement with every other Court of Appeals that has addressed the issue,[1] the Court of Appeals for the Fourth Circuit, held, by a divided vote, that an uncounseled and hence unconstitutional felony conviction may form the predicate for conviction under § 1202 (a)(1) of the Omnibus Crime Control and Safe Streets Act of 1968. Today the Court affirms that judgment, but by an analysis that cannot be squared with either the literal language of the statute or controlling decisions of this Court. I respectfully dissent.

## I

Two longstanding principles of statutory construction independently mandate reversal of petitioner's conviction. The first is the precept that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952). The Court has repeatedly reaffirmed this "rule of lenity." See, *e. g.*, *Simpson* v. *United States*, 435 U. S. 6, 14 (1978); *United States* v. *Bass*, 404 U. S. 336, 347–349 (1971); *Rewis* v. *United States*, 401 U. S. 808, 812 (1971); *Ladner* v. *United States*, 358 U. S. 169,

[1] See, *e. g.*, *Dameron* v. *United States*, 488 F. 2d 724 (CA5 1974); *United States* v. *Lufman*, 457 F. 2d 165 (CA7 1972); *United States* v. *DuShane*, 435 F. 2d 187 (CA2 1970); *United States* v. *Thoresen*, 428 F. 2d 654 (CA9 1970). See generally Comment, 92 Harv. L. Rev. 1790 (1979).

177 (1958); *Bell* v. *United States*, 349 U. S. 81 (1955). Indeed, the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" has previously been invoked in interpreting the very provision at issue in this case. See *United States* v. *Bass*, *supra*.

The Court declines to apply this established rule of construction in this case because, in its view, "[t]here is no ambiguity here." *Ante*, at 65. In light of the gloss the Court places on the literal language of the statute, I find this to be a curious conclusion. By its own terms, § 1202 (a)(1) reaches "[a]ny person *who has been convicted* . . . of a felony." The provision on its face admits of no exception to its sweeping proscription. Yet despite the absence of any qualifying phrase, the Court concedes—as it must—that the statute cannot be interpreted so as to include those persons whose predicate convictions have been vacated or reversed on appeal. *Ante*, at 60–61, and n. 5.

It thus appears that the plain words of § 1202 (a)(1) are not so clear after all, and we therefore must determine the section's reach. Two alternative constructions are offered: The first is the Government's—that § 1202 (a)(1) may be read to permit only *outstanding* felony convictions to serve as the basis for prosecution. Tr. of Oral Arg. 29–30. The second is petitioner's—that the predicate conviction must be not only outstanding, but also constitutionally *valid*. Because either interpretation fairly comports with the statutory language, surely the principle of lenity requires us to resolve any doubts against the harsher alternative and to read the statute to prohibit the possession of firearms only by those who have been *constitutionally* convicted of a felony.

The Court nevertheless adopts the Government's construction, relying on a supposed legislative resolve to enact a sweeping measure against the misuse of firearms. But however expansive § 1202 was meant to be, we are not faithful to "our duty to protect the rights of the individual," *Dalia* v. *United States*, 441 U. S. 238, 263 (1979) ( STEVENS, J., dis-

senting), when we are so quick to ascribe to Congress the intent to punish the possession of a firearm by a person whose predicate felony conviction was obtained in violation of the right to the assistance of counsel, "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson* v. *Zerbst*, 304 U. S. 458, 462 (1938). Petitioner has once already been imprisoned in violation of the Constitution. In the absence of any clear congressional expression of its intent, I cannot accept a construction of § 1202 (a)(1) that reflects such an indifference to petitioner's plight and such a derogation of the principles of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).[2]

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[2] As the Court has previously observed, § 1202 "was hastily passed, with little discussion, no hearings, and no report." *United States* v. *Bass*, 404 U. S. 336, 344 (1971). "In short, 'the legislative history of [the] Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will.'" *Id.*, at 346 (quoting *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 483 (1951)). It is thus little wonder that the Court finds no explicit support in the statute's legislative history for petitioner's construction.

Nor do the few signposts that do exist in the history and structure of Title VII point unambiguously to the Court's conclusion. That Congress included provisions within the Omnibus Act whereby a convicted felon could have his disability removed by a qualifying pardon or the Secretary's consent, see §§ 1203 (2) and 925 (c), does not mean that Congress intended them to be exclusive remedies. Indeed, these provisions were clearly designed only to provide a mechanism for those persons with *valid* felony convictions to seek relief from the prohibitions of § 1202.

Similarly, a comparison between the scope of Title IV and Title VII is unenlightening on the question before us. Simply because the former Title imposes a disability on any person under a felony indictment, it by no means follows, *a fortiori* or otherwise, that Congress intended by the latter Title to impose a somewhat harsher disability on those persons with unconstitutional felony convictions. Cf. *ante*, at 64. Significantly, the restrictions attaching to an individual under indictment are necessarily temporary, while those imposed on the basis of a previous conviction are indefinite in duration. Moreover, Congress' failure to include persons "under indictment" within the proscriptions of § 1202 more plausibly signals its desire to demand a greater indication of potential danger-

## II

The second maxim of statutory construction that compels a narrow reading of § 1202 (a)(1) is the "cardinal principle" that "if a serious doubt of constitutionality is raised, . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Accord, *Schneider* v. *Smith*, 390 U. S. 17, 26 (1968); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953); *United States* v. *CIO*, 335 U. S. 106, 120–121, and n. 20 (1948). And doubts as to the constitutionality of a statute that could predicate criminal liability solely on the existence of a previous uncounseled felony conviction are indeed serious, for a trilogy of this Court's decisions would seem to prohibit precisely such a result.

*Burgett* v. *Texas*, 389 U. S. 109 (1967), held that a prior uncounseled felony conviction was void and thus inadmissible in a prosecution under a Texas recidivist statute. *Burgett* stated: "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." *Id.*, at 115 (citation omitted). *United States* v. *Tucker*, 404 U. S. 443 (1972), and *Loper* v. *Beto*, 405 U. S. 473 (1972), respectively prohibited the use of uncounseled felony convictions as a factor to be considered in sentencing, and to impeach the defendant's credibility.

*Burgett* and its progeny appear to control the result in this case. The clear teaching of those decisions is that an uncoun-

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ousness than would be provided by the mere fact of indictment—or, for that matter, by an uncounseled felony conviction. In fact, in a slightly different context, Congress has expressly rejected the proposition that an invalid prior conviction is a reliable indicator of "dangerousness." See 18 U. S. C. § 3575 (e) (dangerous special offender).

seled felony conviction can never be used "to support guilt or enhance punishment for another offense." Here, petitioner could not have been tried and convicted for violating § 1202 (a)(1) in the absence of his previous felony conviction. It could not be plainer that his constitutionally void conviction was therefore used "to support guilt" for the current offense. The Court's bald assertion to the contrary is simply inexplicable.

The Court's attempt to distinguish *Burgett*, *Tucker*, and *Loper* on the ground that the validity of the subsequent convictions or sentences in those cases depended on the *reliability* of the prior uncounseled felony convictions, while in the present case the law focuses on the mere *fact* of the prior conviction, is unconvincing. The fundamental rationale behind those decisions was the concern that according any credibility to an uncounseled felony conviction would seriously erode the protections of the Sixth Amendment. Congress' decision to include convicted felons within the class of persons prohibited from possessing firearms can rationally be supported only if the historical fact of conviction is indeed a reliable indicator of potential dangerousness. As we have so often said, denial of the right to counsel impeaches "the very integrity of the fact-finding process." *Linkletter* v. *Walker*, 381 U. S. 618, 639 (1965). Accord, *Lakeside* v. *Oregon*, 435 U. S. 333, 341 (1978); *Argersinger* v. *Hamlin*, 407 U. S. 25, 31 (1972). And the absence of counsel impairs the reliability of a felony conviction just as much when used to prove potential dangerousness as when used as direct proof of guilt. Cf. *Loper* v. *Beto*, *supra*, at 483 (opinion of STEWART, J.).

## III

Finally, it is simply irrelevant that petitioner could have challenged the validity of his prior conviction in appropriate proceedings in the state courts. Nor can the existence of such a remedy prohibit him from raising the unconstitutionality of that conviction as a defense to the present charge.

In the first place, neither *Burgett* nor *Loper* imposed any requirement that a defendant collaterally attack his uncounseled conviction *before* he faces prosecution under § 1202 (a)(1); in both cases the Court held the use of the prior invalid convictions impermissible even though the defendants had taken no affirmative steps to have them overturned. More to the point, however, where the very defect in the initial proceedings was that the accused did not have the assistance of counsel in defending the felony charges against him, it simply defies reason and sensibility to suggest that the defendant must be regarded as having waived his defense to the § 1202 (a)(1) prosecution because he failed first to retain counsel to seek an extraordinary writ of *coram nobis*.

# BLOOMER *v.* LIBERTY MUTUAL INSURANCE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-1418. Argued December 4, 1979—Decided March 3, 1980

*Held:* A stevedore's lien for the amount of its compensation payment to an injured longshoreman under the Longshoremen's and Harbor Workers' Compensation Act against the longshoreman's recovery in a negligence action against the shipowner may not be reduced by an amount representing the stevedore's proportionate share of the longshoreman's legal expenses in obtaining recovery from the shipowner. The language, structure, and history of the Act support this conclusion, rather than the application of the equitable "common fund" doctrine that when a third person benefits from litigation instituted by another, that person may be required to bear a portion of the expenses of suit. Pp. 77–88.

586 F. 2d 908, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 88.

*Alan C. Rassner* argued the cause and filed briefs for petitioner.

*Douglas A. Boeckmann* argued the cause and filed a brief for respondent.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, a longshoreman is entitled to receive compensation payments from his stevedore for disability or death resulting from an injury occurring on the navigable waters of the United States.

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*Briefs of *amici curiae* were filed by *Paul S. Edelman, Arthur Abarbanel,* and *Theodore I. Koskoff* for the Association of Trial Lawyers of America; and by *Dennis Lindsay* and *Robert Babcock* for the Master Contracting Stevedore Association of the Pacific Coast, Inc.

If the longshoreman believes that his injuries warrant a recovery in excess of the compensation provided under the Act, he may also bring a negligence action against the owner of the vessel on which the injury occurred. The longshoreman's recovery from the shipowner is subject to the stevedore's lien in the amount of the compensation payment. The question for decision is whether the stevedore's lien must be reduced by a proportionate share of the longshoreman's expenses in obtaining recovery from the shipowner, or whether the stevedore is instead entitled to be reimbursed for the full amount of the compensation payment.

## I

Petitioner William E. Bloomer, Jr., was injured during the course of his employment on board the vessel S. S. *Pacific Breeze*. He received $17,152.83 in compensation from respondent Liberty Mutual Insurance Co., the designated carrier of workers' compensation for petitioner's employer, Connecticut Terminal Co.[1] Thereafter petitioner brought this diversity action against the owner of the vessel. He alleged that the shipowner had negligently created hazardous conditions on board the vessel, that the ship's deck was slippery and dangerous, and that as a result he had fallen and incurred severe injuries.

During settlement negotiations, petitioner's counsel gave respondent notice of the pending action and requested it to reduce its lien by a share of the costs of recovery. That share would be computed as an amount bearing the same ratio to the total cost of recovery as the compensation payments bear to the total recovery. Respondent refused petitioner's request, asserted its right to full reimbursement, and successfully moved to intervene in the action. Soon thereafter petitioner settled with the shipowner for $60,000. He moved for sum-

[1] For convenience we shall use the term "stevedore" to refer to both the employer and its insurer.

mary judgment directing that respondent's lien on the recovery be reduced by an amount representing its proportionate share of the expenses of the suit against the shipowner. Petitioner claimed that since the recovery from the shipowner would benefit respondent, equity required that respondent bear a portion of the expenses of obtaining that recovery.

The District Court denied petitioner's motion,[2] and the United States Court of Appeals for the Second Circuit affirmed. *Bloomer* v. *Tong*, 586 F. 2d 908 (1978). The Court of Appeals concluded that a stevedore should not be required to pay a share of the longshoreman's legal expenses in a suit

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[2] The District Court's distribution was as follows:

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|---|---|---|
| Recovery | | $60,000.00 |
| less expenses | | (202.80) |
| balance for distribution | | 59,797.20 |
| less attorney's fee of one-third | | (19,932.40) |
| balance | | 39,864.80 |
| less lien of respondent | | (17,152.83) |
| net to petitioner | | 22,711.97 |

Under this distribution scheme, petitioner received a total of $39,864.80 from the stevedore and shipowner, an amount equivalent to the full $60,000 recovery minus expenses.

Petitioner sought to have the fund distributed in the following manner:

| | | |
|---|---|---|
| Recovery | | $60,000.00 |
| less expenses | | (202.80) |
| balance for distribution | | 59,797.20 |
| less attorney's fee of one-third | | (19,932.40) |
| balance | | 39,864.80 |
| lien of respondent | 17,152.83 | |
| less proportionate share of fees and expenses (.3355866 × $17,152.83) | (5,756.26) | |
| | 11,396.57 | (11,396.57) |
| net to petitioner | | 28,468.23 |

Under this distribution, petitioner would receive a total of $45,621.06, $5,756.26 over and above the amount representing his $60,000 damages recovery minus expenses.

brought against the shipowner. We granted certiorari to resolve this recurring question, on which the Courts of Appeals have been divided.[3] 441 U. S. 942 (1979). We affirm.

## II

Petitioner's argument amounts to an appeal to the equitable principle that when a third person benefits from litigation instituted by another, that person may be required to bear a portion of the expenses of suit. He invokes cases establishing that in certain circumstances, courts should exercise their equitable powers to charge beneficiaries with a share of the expenses of obtaining a "common fund" through litigation. See *Boeing Co.* v. *Van Gemert*, 444 U. S. 472 (1980); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 257–259 (1975); *id.*, at 275–280 (MARSHALL, J., dissenting); *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939). When measured against the language, structure, and history of the Longshoremen's and Harbor Workers' Compensation Act, however, petitioner's argument must fail.

The Act provides a comprehensive scheme governing an injured longshoreman's rights against the stevedore and shipowner. The longshoreman is not required to make an election between the receipt of compensation and a damages action against a third person, 33 U. S. C. § 933 (a). After receiving a compensation award from the stevedore, the longshoreman is given six months within which to bring suit against the third

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[3] The Ninth and Fourth Circuits have held that the stevedore should be charged with a share of the longshoremen's legal expenses, *Bachtel* v. *Mammoth Bulk Carriers, Ltd.*, 605 F. 2d 438 (CA9 1979); *Swift* v. *Bolten*, 517 F. 2d 368 (CA4 1975). The First Circuit, like the Second, has disallowed apportionment, *Cella* v. *Partenreederei MS Ravenna*, 529 F. 2d 15 (1975), cert. denied, 425 U. S. 975 (1976). The Fifth Circuit has adopted a third approach calling for an individualized inquiry into whether apportionment is fair in the particular case, *Mitchell* v. *Scheepvaart Maatschappij Trans-Ocean*, 579 F. 2d 1274 (1978).

party. 33 U. S. C. § 933 (b). If he fails to seek relief within that period, the acceptance of the compensation award operates as an assignment to the stevedore of the longshoreman's rights against the third party. The Act makes explicit provision for the distribution of any amount obtained by the stevedore in a suit brought pursuant to that assignment. The stevedore is entitled to reimbursement of all compensation benefits paid the employee, and its costs, including attorney's fees. Of the remainder, four-fifths is distributed to the longshoreman, and one-fifth "shall belong to the employer." 33 U. S. C. § 933 (e).[4]

The Act does not expressly provide for the distribution of amounts recovered in a suit brought by the longshoreman. The unambiguous provision that the stevedore shall be reimbursed for all of his legal expenses if he obtains the recovery does, however, speak with considerable force against requiring him to bear a part of the longshoreman's costs when the longshoreman recovers on his own. There is no reason to believe that Congress intended a different distribution of the expenses of suit merely because the longshoreman has brought

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[4] That section provides:

"Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

"(1) The employer shall retain an amount equal to—

"(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

"(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

"(C) all amounts paid as compensation;

"(D) the present value of all amounts thereafter payable as compensation, . . . and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title . . . ; and

"(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer."

the action. Petitioner asserts, however, that in the absence of an explicit statutory resolution, the recovery against the shipowner represents a common fund for whose creation the stevedore may properly be charged. To evaluate this argument we turn to the history of the relevant provisions of the Act.

## III

As originally enacted in 1927, the Act required a longshoreman to choose between the receipt of a compensation award from his employer and a damages suit against the third party. Act of Mar. 4, 1927, § 33, 44 Stat. 1440. If the longshoreman elected to receive compensation, his right of action was automatically assigned to his employer. In 1938, however, Congress provided that in cases in which compensation was not made pursuant to an award by a deputy commissioner (appointed by the Secretary of Labor, see 33 U. S. C. § 940), the longshoreman would not be required to choose between the compensation award and an action for damages. Under the 1938 amendments, no election was required unless compensation was paid pursuant to such an award. See Act of June 25, 1938, ch. 685, §§ 12, 13, 52 Stat. 1168.

Like the present version, the Act as amended in 1938 did not make provision for the distribution of amounts recovered from the third party in a suit brought by the longshoreman. The lower courts, however, interpreted the Act to require that the stevedore be reimbursed for his compensation payment out of the sum recovered from the third party. Congress was understood not to contemplate double recovery on the longshoreman's part, and the stevedore did not, therefore, lose the right to reimbursement for its compensation payment. See, *e. g.*, *The Etna*, 138 F. 2d 37 (CA3 1943); *Miranda* v. *Galveston*, 123 F. Supp. 889 (SD Tex. 1954); *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (SDNY 1952) (Weinfeld, J.), aff'd on opinion below *sub nom. Fontana* v. *Grace Line, Inc.*, 205 F. 2d 151 (CA2), cert. denied, 346 U. S. 886 (1953).

Under the 1938 legislation the lower courts also decided that the stevedore should not be required to bear a proportionate share of the longshoreman's legal expenses. To force the stevedore to do so, it was observed, would guarantee the longshoreman a total recovery in excess of the amount he received in his third-party action. Solely by virtue of the compensation scheme, then, the longshoreman would receive a greater sum than would be possible in an ordinary suit for damages. At the same time the stevedore would be prevented from recovering the full amount of its compensation payment. The courts concluded that these results would violate legislative purposes made manifest by the express provision that the employer may recover its legal expenses from the fund created by its own suit against the third party. See *Davis* v. *United States Lines Co.*, 253 F. 2d 262 (CA3 1958); *Oleszczuk* v. *Calmar S. S. Corp.*, 163 F. Supp. 370 (Md. 1958); *Fontana* v. *Pennsylvania R. Co.*, *supra*, at 463–464.

In 1959, Congress amended the Act to delete the election-of-remedies requirement altogether. Act of Aug. 18, 1959, 73 Stat. 391. Existing law was felt to "wor[k] a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party." S. Rep. No. 428, 86th Cong., 1st Sess., 2 (1959). The result was that an injured employee "usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit." *Ibid.*; see H. R. Rep. No. 229, 86th Cong., 1st Sess. (1959).

Responding to this inequity, the 1959 amendment provided that even when compensation was paid pursuant to an award of the deputy commissioner, the longshoreman's right of action would not be assigned to the stevedore until six months from the date of the award. The legislative history demonstrates that Congress did not intend to alter the rule allowing the stevedore to recover the full amount of its lien from the long-

shoreman's third-party recovery. An employee "would not be entitled to double compensation," for "an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery." S. Rep. No. 428, *supra*, at 2. During the hearings on the 1959 amendments, the rule that an employer would not be required to bear a proportionate share of the longshoreman's cost of recovery was specifically drawn to Congress' attention, and one witness suggested that it should be abandoned.[5] Instead, Congress elected not to disturb the existing rule.[6] Recognizing that no change had

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[5] See Hearings on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act before a Special Subcommittee of the House Committee on Education and Labor, 84th Cong., 2d Sess., 51–58 (1956) (discussing difference between New York law, which allowed an employer to receive full reimbursement of its workmen's compensation payment, and New Jersey law, which required proportionate payment of expenses); see also *id.*, at 38. Indeed, the 1959 bill was largely modeled after the New York workmen's compensation provisions, see S. Rep. No. 428, 86th Cong., 1st Sess., 3 (1959), and under New York law it was well established that the longshoreman would be required to pay his own legal fees. See *Kussack* v. *Ring Constr. Corp.*, 1 App. Div. 2d 634, 153 N. Y. S. 2d 646 (1956), aff'd, 4 N. Y. 2d 1011, 152 N. E. 2d 540 (1958); *Hobbs* v. *Dairymen's League Co-op Assn.*, 258 App. Div. 836, 15 N. Y. S. 2d 694 (1939), appeal dism'd, 282 N. Y. 710, 26 N. E. 2d 823 (1940).

[6] That rule was expressly approved on the floor of the Senate:

"Mr. BUTLER. . . . I understand that the bill merely amends section 33 of the Longshoremen's and Harbor Workers' Act, so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. It is my further understanding that the courts have consistently held that the present section 33 of the act gives the employer a lien on the employee's third party recovery for the compensation and benefits paid by the employer.

"Is it the Senator's understanding, then, that the passage of this measure *would in no way affect the present construction of the act with respect to the employer's lien on the employee's third-party recovery for compensation and benefits paid by the employer?*

"Mr. BARTLETT. The distinguished Senator from Maryland is correct.

"In further explanation on this point, I ask unanimous consent to have

been contemplated, the courts continued to hold that a stevedore would not be required to bear a proportionate share of the longshoreman's legal expenses. See *Haynes* v. *Rederi A/S Aladdin*, 362 F. 2d 345 (CA5 1966); *Ashcraft & Gerel* v. *Liberty Mutual Ins. Co.*, 120 U. S. App. D. C. 51, 343 F. 2d 333 (1965); *Petition of Sheffield Tankers Corp.*, 222 F. Supp. 441 (ND Cal. 1963).

In 1972, Congress enacted more extensive Amendments to the Act, see *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 262 (1979), and it is these Amendments that according to petitioner, justify a change in the rule with respect to attorney's fees. Concerned that compensation benefits had been far too low, Congress altered the benefit structure of the Act so as to increase both maximum and minimum

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printed at this point in the RECORD a brief statement from the Committee on Labor and Public Welfare . . . :

" 'There is no necessity for a provision giving the employer a lien on the employee's third-party recovery for the compensation and benefits paid by the employer, inasmuch as the courts have construed the present section 33 as providing such lien. In addition, as a result of judicial construction of the existing section, the employee is entitled to deduct his expenses incurred in third-party proceedings,' " 105 Cong. Rec. 12674 (1959) (emphasis added).

The express statement that the employee should deduct his expenses from the recovery is, of course, a plain indication that those expenses would not be borne by the stevedore. Cf. n. 13, *infra*.

The House version of the amendment would have provided: "[T]he carrier liable for the payment of . . . compensation shall have a lien on the proceeds of any recovery from [a] third person, whether by judgment, settlement, or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under, or provided, or estimated, by this Act . . . ." H. R. Rep. No. 229, 86th Cong., 1st Sess., 6 (1959). The House passed this version of the amendment, 105 Cong. Rec. 5561–5562 (1959), but later concurred in the Senate version on the evident assumption that the Senate version also adopted existing judicial practice. See *id.*, at 15343.

benefits substantially.[7] These increases were linked to two provisions designed to reduce litigation and to ensure that stevedores would have sufficient funds to pay the additional compensation. First, Congress abolished the unseaworthiness remedy for longshoremen, recognized in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), and limited the longshoreman's action against the shipowner to one based on negligence. Second, Congress eliminated the third-party action by the shipowner against the stevedore, recognized in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956). In that case the Court held that a shipowner could obtain damages from the stevedore when it showed that the stevedore had breached its warranty to the shipowner of workmanlike service. As the House Report notes, the consequence was that "a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel," with the result "that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs." H. R. Rep. No. 92–1441, p. 5 (1972); see S. Rep. No. 92–1125, p. 9 (1972). Indeed, there was considerable testimony during the hearings that third-party actions had resulted in congested courts and that the primary beneficiaries had been lawyers, not injured longshoremen.[8] The Senate

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[7] Before the Amendments, the maximum weekly compensation payment was $70; after the Amendments, the maximum is 200% of the national average weekly wage, to be determined annually by the Secretary of Labor. Before the Amendments, the minimum weekly payment was $18; the Amendments provide for a minimum in the amount of the lesser of the employee's full average weekly wage or 50% of the national average weekly wage. The Amendments increased or improved benefits in other ways not material here. See 33 U. S. C. §§ 906–910.

[8] See Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 33, 38–39, 244, 258, 263, 271, 290, 304, 416, 431, 621–623, 632, 642, 661,

Report stated that "[t]he social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers." *Id.*, at 4. The elimination of the shipowner's cause of action against the stevedore was intended to reduce litigation, immunize stevedores and their insurers from liability in third-party actions, and assure conservation of stevedore resources for compensation awards to longshoremen.

Witnesses also brought to the attention of Congress the longstanding rule [9] that an employer could recover the full amount of its compensation award from the longshoreman's recovery against the shipowner.[10] Congress did not, however, enact any legislation concerning that rule.

Petitioner argues that the 1972 Amendments so altered the equities as to compel a holding that a stevedore must pay a proportionate share of the longshoreman's expenses in a third-party action brought against the shipowner. He observes that before the Amendments, the longshoreman and the stevedore had adverse interests in the third-party action: if the longshoreman were successful in that suit, the shipowner frequently would attempt to require the stevedore to make payment of amounts due the longshoreman. With the abolition of the shipowner's cause of action, the stevedore and the

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725, 730 (1972); Hearings on H. R. 247 et al. before the Select Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 2d Sess., 47–48, 60, 85–86, 176 (1972).

[9] Contrary to MR. JUSTICE BLACKMUN's suggestion, see *post*, at 92, that the somewhat divergent rationales adopted by the lower courts demonstrate that there was no settled rule prior to the 1972 Amendments, we have been unable to find a single case, and none is cited in the dissenting opinion, in which a court held that a stevedore would be required to pay a share of the longshoreman's legal expenses. The uniform rule was to the contrary, and it is that rule of which Congress was informed in 1959 and 1972 and which it approved in 1959. See n. 6, *supra*.

[10] See Hearings on S. 2318 et al., *supra* n. 8, at 160, 371, 720; Hearings on H. R. 247 et al., *supra* n. 8, at 119, 157–158, 295.

longshoreman had a common interest in the longshoreman's recovery against the shipowner. Petitioner concludes that the common-fund doctrine should be available to permit the employee to recover from the stevedore a proportionate share of the expenses of suit.

In light of the Act and its legislative history, however, we are unable to accept petitioner's argument. It is of course true that the stevedore and longshoreman now have a common interest in the longshoreman's recovery against the shipowner, but it does not follow that the stevedore should be required to pay a share of the longshoreman's legal expenses. Congress has not modified 33 U. S. C. § 933 (e), providing that the stevedore is not required to pay its legal expenses in cases in which it has recovered against the shipowner pursuant to an assignment from the longshoreman. Moreover, in 1972 Congress was informed of, but did not alter, the uniform rule that the longshoreman's legal fees would be paid by the longshoreman alone. In these circumstances we are reluctant to take steps to change that rule on our own. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S., at 273.

In addition, to the extent that the 1972 Amendments offer guidance, they strongly suggest that the rule for payment of attorney's fees was not intended to be altered. The legal expenses incurred by stevedores in connection with third-party actions were understood to be a major obstacle to the funding of increased compensation payments. Numerous witnesses testified that third-party actions frequently inured to the benefit of lawyers, depleting the stevedore's resources and congesting the courts without aiding the injured employee. It would be ironic indeed if statutory amendments designed to eliminate the stevedore's liability in connection with third-party actions were interpreted to give birth to an entirely new liability in the form of a charge for the longshoreman's legal expenses.[11]

[11] The dissenting opinion suggests that the "chief" purpose of the 1972 Amendments was to benefit longshoremen, and that the distribution we approve would disserve this purpose in favor of the merely "incidental"

We are unwilling to attribute to Congress an intention to allow creation of a new liability irreconcilable with its general desire to reduce litigation and to ensure conservation of the legal expenses of stevedores and their insurers.[12]

Finally, we return to the original basis for the rule that a stevedore would not be required to pay a portion of the longshoremen's expenses in his suit against the shipowner. The compensation award was intended to be an immediate and readily available payment to the injured longshoreman. By receiving this payment, the longshoreman was not foreclosed from pursuing an action against the shipowner. At the same time, he was not entitled to double recovery, and the stevedore would be reimbursed in full for his compensation payment.[13]

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intention to conserve stevedore expenses. *Post*, at 94–95. The attempted separation of the two legislative purposes is unpersuasive. Congress found it necessary to eliminate stevedore liability in connection with third-party actions precisely in order to assure that stevedores would have sufficient funds to pay vastly increased compensation benefits to longshoremen. In these circumstances it is for Congress, not this Court, to determine whether a requirement of proportional payment of legal expenses would ultimately benefit injured longshoremen, or instead longshoremen's lawyers, who were found to have been the primary beneficiaries of third-party actions in the past. See *supra*, at 82–84.

[12] Petitioner suggests that a requirement of proportional payment would ultimately aid stevedores by encouraging third-party suits and thus making it more likely that stevedores will receive reimbursement for the compensation payment. The Act, however, contains special incentives designed to encourage the stevedore to bring suit on its own if the longshoreman elects not to do so. See n. 4, *supra*.

[13] Respondent does not challenge the approach adopted in *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461, 463–464 (SDNY 1952), aff'd on opinion below *sub nom. Fontana* v. *Grace Line, Inc.*, 205 F. 2d 151 (CA2), cert. denied, 346 U. S. 886 (1953), under which the expenses of suit, including attorney's fees, represent the first charge on the recovery against the third party. See S. Rep. No. 428, 86th Cong., 1st Sess., 2 (1959); n. 6, *supra*. Under this view, if the recovery against the shipowner is less than the sum of the lien and the expenses of suit, the longshoreman will receive the full amount of his expenses even if the remainder is in-

The result we reach enables the longshoreman to recover an amount no less than that which he would receive through an ordinary negligence action,[14] and also immunizes the stevedore from liability in connection with the third-party action. If we were to accept petitioner's view, an injured longshoreman would ultimately receive a sum equal to the full amount of his recovery against the shipowner and, in addition, a supplement consisting of the stevedore's contribution to the longshoreman's legal expenses. This supplement would represent a windfall in excess of the amount the longshoreman received as compensation for the injuries he has suffered. The stevedore would not obtain reimbursement for the full amount of its compensation payment, but would instead have that amount reduced by a possibly substantial legal fee. This result would be contrary to the allocation of attorney's fees expressly provided by Congress for suits brought by the stevedore pursuant to an assignment from the longshoreman. In these circumstances we do not believe that the Act and its legislative his-

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sufficient to reimburse the stevedore for its lien. See *Valentino* v. *Ricknerș Rhederei, G. M. B. H., SS Etha,* 552 F. 2d 466 (CA2 1977). We do not today address the *Valentino* situation, and contrary to the implication of the dissent, nothing in our decision suggests that the stevedore's lien has priority over the longshoreman's expenses.

[14] See n. 2, *supra,* illustrating that petitioner's distribution scheme would result in a recovery of $5,756.26 in excess of the amount he would receive if there were a simple negligence action and no compensation scheme.

The Act explicitly allows attorney's fees in cases in which an employer declines to pay compensation, 33 U. S. C. § 928, and in cases in which the employer brings suit pursuant to an assignment from the longshoreman. These provisions reinforce the conclusion that if Congress had intended to allow proportionate sharing of legal expenses, it would have done so expressly.

Petitioner suggests that the distribution we approve will result in a $5,756.26 windfall to the respondent, since it is in effect permitted to recover its lien without contributing to the costs of the recovery. But as explained in the text, our review of the Act and its legislative history persuades us that Congress intended the stevedore to recover the full amount of its lien, regardless of who brings the action.

tory can fairly be read to support the distribution proposed by petitioner.[15]

The judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE BLACKMUN, dissenting.

The Court's approach in this case strikes me as somewhat crabbed. By tilting with the specter of "double recovery," the Court adopts a construction of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*, that relegates the injured longshoreman's welfare to secondary

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[15] Nothing we say today is intended to affect the established power of a court of equity to charge beneficiaries with a proportionate share of the costs of creating a common fund through litigation. See Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597 (1974). Nor are we presented the question whether that power would be properly exercised in the setting of a workers' compensation scheme if the particular Act and its legislative history were ambiguous on the subject. For disparate results in the state courts, compare *Burt* v. *Hartford Acc. & Indem. Co.*, 252 Ark. 1236, 483 S. W. 2d 218 (1972); *Liberty Mut. Ins. Co.* v. *Western Cas. & Sur. Co.*, 111 Ariz. 259, 527 P. 2d 1091 (1974); *Commercial Union Ins. Co.* v. *Scott*, 116 Ga. App. 633, 158 S. E. 2d 295 (1967); *Tucker* v. *Nason*, 249 Iowa 496, 87 N. W. 2d 547 (1958), with *Quinn* v. *State*, 15 Cal. 3d 162, 539 P. 2d 761 (1975); *Security Ins. Co. of Hartford* v. *Norris*, 439 S. W. 2d 68 (Ky. 1969); *Broussard, Broussard & Moresi, Ltd.* v. *State Auto & Cas. Underwriters Co.*, 287 So. 2d 544 (La. App. 1973), cert. denied, 290 So. 2d 908 (La. 1974); *Carter* v. *Wooley*, 521 P. 2d 793 (Okla. 1974). See generally 2A A. Larson, Workmen's Compensation § 74.32 (1976 and 1979 Supp.).

A number of States have required proportional sharing of legal expenses by statute. See, *e. g.*, Idaho Code § 72–223 (1973); Ill. Rev. Stat., ch. 48, § 138.5 (1977); Mich. Comp. Laws Ann. § 418.827 (Supp. 1978); N. Y. Work. Comp. Law § 29 (McKinney Supp. 1979); Pa. Stat. Ann., Tit. 77, § 671 (Purdon Supp. 1979); Va. Code § 65.1–43 (1973); Wash. Rev. Code Ann. § 51.24.010 (Supp. 1978). See generally Larson, *supra;* Atleson, Workmen's Compensation: Third Party Actions and the Apportionment of Attorney's Fees, 19 Buffalo L. Rev. 515 (1970). That route, of course, remains available to Congress.

status, well behind the interest of his stevedore-employer in conserving resources.

Under the Court's rule, the stevedore has everything to gain and nothing to lose. The longshoreman takes the risk and the worry of the litigation and, if he gains enough, the stevedore is home free. This result does not seem to me to square with the Court's recent recognition that the Act should be construed with the beneficent purpose of worker protection foremost in mind. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 268 (1977). Nor does it entirely square with the modern concept that the costs of industrial accidents are expenses to be borne by the industrial enterprise and not by the injured workman.[1] It also fails to do equity where equity is due. Since I cannot agree that Congress has required us so to deviate from the principles of equity and the governing purposes of the Act, I respectfully dissent.

The Court recognizes, *ante*, at 79, that although Congress has provided a detailed scheme for the distribution of the amount recovered in a third-party action initiated by the *stevedore*, it has never fixed by statute the details of distribution when it is the *longshoreman* who brings suit. The Court, nonetheless, discovers and espouses a settled judicial rule for division of the recovery in an action by the longshoreman, and it transforms that rule into a statutory mandate by pronouncing that we should not presume to change what the Court thinks Congress, by inaction, apparently has left in force. *Ante*, at 85–86. I feel the Court has oversimplified the variegated history of the judicial "rule," has overdrawn the clarity of congressional approval of it, and has failed to estimate the degree to which the rationale for exonerating the stevedore from bearing a portion of the attorney's fees was undermined by the 1972 Amendments to the Act.

The earliest cases mentioned by the Court, *The Etna*, 138

[1] See J. Boyd, The Law of Compensation for Injuries to Workmen 10 (1913); H. Somers & A. Somers, Workmen's Compensation 26 (1954).

F. 2d 37 (CA3 1943), and *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (SDNY 1952), aff'd mem. *sub nom. Fontana* v. *Grace Line, Inc.*, 205 F. 2d 151 (CA2), cert. denied, 346 U. S. 886 (1953), chiefly concerned the broad question, not at issue here, whether the stevedore is entitled to *any* recoupment from the longshoreman's recovery against the shipowner. These cases established that the stevedore is entitled to recoupment, and thus that the longshoreman is not to receive the "double recovery" of full statutory compensation plus full damages in an action at law. No one, at this juncture, doubts the validity of this holding or its approval by Congress. See 33 U. S. C. § 933 (f); S. Rep. No. 428, 86th Cong., 1st Sess., 2 (1959). The question we presently face is a much narrower one that a general dislike for any double recovery does not at all resolve.

To be sure, *Fontana*, *supra*, and *Davis* v. *United States Lines Co.*, 253 F. 2d 262 (CA3 1958), held, as the Court does today, that attorney's fees for a third-party action must be borne in their entirety by the longshoreman. These cases drew support for this conclusion from both the statutory division of recovery when the stevedore brings suit and the view that the "expense of securing the recovery is, as in equity it should be, a first charge against the fund itself." *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp., at 464. As a review of subsequent case law demonstrates, however, this reasoning never has achieved the broad acceptance that the Court's opinion implies. In the Fourth and the Fifth Circuits, and perhaps even in the Second Circuit, alternative approaches to the problem have been advocated and applied.

In *Ballwanz* v. *Jarka Corp.*, 382 F. 2d 433 (1967), the Fourth Circuit adopted an entirely different rationale. The court recognized that *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956), which permitted shipowners to bring indemnity actions against stevedores, produced a "rotary situation" in which the stevedore was effectively aligned

with the shipowner against the third-party suit. 382 F. 2d, at 434. As a result, recoupment of the stevedore's compensation lien from the longshoreman's recovery involved "no more than a transfer of the charge in that amount from its [insurer's] loss as compensation carrier to its loss as liability carrier." *Id.*, at 435. It was the contrariety of interests and lack of true benefit to the stevedore, and not the arguments advanced in *Fontana* and *Davis*, that led the court to refuse proration of fees.

In the Fifth Circuit, the proper distribution of recoveries in third-party actions initiated by longshoremen has been the subject of continuing debate. *Strachan Shipping Co.* v. *Melvin*, 327 F. 2d 83 (1964), applied *Fontana*'s conclusion that attorney's fees are a "first charge" against the recovery in a case where the recovery was so small that nothing was left for the longshoreman. The decision provoked a vigorous dissent, which proposed a different reading of *Fontana* and *Davis* that would give the compensation lien priority over the fees. *Id.*, at 87–89. This alternative appears to have been applied in *Haynes* v. *Rederi A/S Aladdin*, 362 F. 2d 345, 351 (1966), cert. denied, 385 U. S. 1020 (1967), albeit on the ground that the stevedore was represented in the action by its own counsel. Eventually, however, both readings of the *Fontana-Davis* "rule" were displaced in the Fifth Circuit by an approach that, in certain circumstances, required the longshoreman and the stevedore to "pay attorney's fees and litigation expenses in proportion to their recoveries." *Chouest* v. *A & P Boat Rentals, Inc.*, 472 F. 2d 1026, 1035–1036, cert. denied *sub nom. Travelers Ins. Co.* v. *Chouest*, 412 U. S. 949 (1973).

In the Second Circuit, *Fontana*'s approach has not been uniformly followed. *Landon* v. *Lief Hoegh & Co.*, 521 F. 2d 756, 761 (1975), cert. denied *sub nom. A/S Arcadia* v. *Gulf Ins. Co.*, 423 U. S. 1053 (1976), treated the compensation lien as an "express trust for the benefit of the employer" with the

longshoreman as statutory trustee. In the District Courts, moreover, both the "conflict" theory developed in *Ballwanz* and the approach advocated by the *Strachan* dissent gained some currency. See, *e. g., Spano* v. *N. V. Stoomvaart Maatschappij "Nederland,"* 340 F. Supp. 1194 (SDNY 1971); *Russo* v. *Flota Mercante Grancolombiana,* 303 F. Supp. 1404, 1407 (SDNY 1969). These cases were subsequently disapproved in *Valentino* v. *Rickners Rhederei, G. M. B. H., SS Etha,* 552 F. 2d 466 (CA2 1977), which reinstated the *Fontana* rationale.

I mention these variations and counterpoints to the *Fontana-Davis* theme not to challenge the Court's assertion that, prior to the 1959 and 1972 amendments to the Act, stevedores generally were exonerated from bearing a portion of attorney's fees incurred in longshoreman-initiated actions, but rather to suggest that the Court errs when it implies that the case law presented a *settled* judicial construction of the Act for Congress to approve. Indeed, the situation was even more complicated than this brief exposition illustrates, since the various rationales employed by the courts led them into disarray over the handling of attorney's fees in cases where the third-party recovery was insufficient to satisfy both the fees and the stevedore's compensation lien in their entirety. See *Valentino* v. *Rickners Rhederei, G. m. B. H., SS Etha,* 417 F. Supp. 176, 177–179 (EDNY 1976), aff'd on other grounds, 552 F. 2d 466 (CA2 1977). The legislative history relied upon by the Court, *ante,* at 80–81, 84, fails to show that Congress delved into the intricacies of this judicial debate, or indeed that it did more than barely scratch the surface in consideration of fee allocations in actions brought by longshoremen. The most that can be gleaned from this history is that Congress intended not to interfere with judicial developments in this sphere.

As a result, I think that the Court informs congressional inaction with the wrong meaning, and that it draws an analogy to the statutory allocation of stevedore-initiated recoveries where none, in fact, exists. Had Congress intended rote ap-

plication of the allocation scheme in 33 U. S. C. § 933 (e) to recovery in a longshoreman-initiated action, specification of this result would have been a simple task, and one would have expected Congress to say so. Instead, despite the obvious prevalence of such suits,[2] Congress left the matter to the judicial process. Although it is somewhat precarious to find significance in a congressional omission, I view the absence of action in this case as a clear signal that Congress regarded the allocation of a recovery in a suit by a longshoreman as a more fluid and complicated matter than allocation in a suit by a stevedore, and that it left the courts free to balance the equities instead of commanding adherence to a strict "arithmetic ranking" of liens. See *Mitchell* v. *Scheepvaart Maatschappij Trans-Ocean*, 579 F. 2d 1274, 1279 (CA5 1978).

Adaptation of the statutory framework, of course, might be desirable if it achieved an equitable result. But it does not. Indeed, the analogy to the division of a recovery under § 933 (e) itself is flawed. When the stevedore brings the lawsuit, its own recovery comes first after expenses and costs of litigation have been paid; the longshoreman, as nonparticipating beneficiary, receives only a portion of the remainder. In contrast, under the Court's ruling, the longshoreman who brings suit must wait in line until the nonparticipating stevedore's interests have been satisfied in full. Under the statute, then, the party who takes the risk of loss receives priority of treatment. Under the Court's ruling, he does not. The apparent symmetry of a strict analogy to the statutory formula thus produces, for the longshoreman, an asymmetrical result. Considerations of equity surely do not require that approach.

As I weigh the equities, the most persuasive reason heretofore for exonerating the stevedore from bearing a proportion-

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[2] See *Valentino* v. *Rickners Rhederei, G. M. B. H., SS Etha*, 552 F. 2d 466, 469 (CA2 1977), where the court took notice that "stevedores do not, as a practical matter, pursue these lawsuits—presumably for fear of antagonizing their customers."

ate share of attorney's fees has been the stevedore's contingent liability for indemnity of the shipowner under *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956). That liability, of course, was eliminated by the 1972 Amendments to the Act. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 262 (1979); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S., at 261–262. Thus, it is now clear from the outset of each longshoreman's suit that the attorney's efforts serve the interests of the stevedore as well as those of the longshoreman. If the action is successful, the stevedore obtains recoupment of the compensation benefits it has paid, without risk, without the jeopardy to customer relations that might arise if the stevedore or its insurer brought the suit, and without adjustment for the possibility that the stevedore itself is partly responsible for the injury. The amount of the stevedore's recoupment ordinarily depends directly on the lawyer's skill in proving both the shipowner's negligence and damages. This direct pecuniary interest in the outcome of the litigation justifies, in my view, an equitable allocation of the costs of bringing suit in proportion to recovery from the common fund. See *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 166–167 (1939). Without that allocation, the longshoreman must bear all the risk for only a limited part of the benefit.

In addition to eliminating the only sound reason for refusing an allocation on equitable grounds, the 1972 Amendments also show clearly that congressional concern was primarily for the workman and not for the stevedore-employer or for the shipowner. The chief purpose of the Amendments was to benefit the longshoreman. Congress' desire to reduce excessive litigation and thus to conserve stevedore resources, of which the Court makes so much, was incidental and secondary to this purpose. When, for example, Congress eliminated the litigation merry-go-round produced by the indemnity and unseaworthiness actions created in *Ryan Stevedoring Co.* v.

*Pan-Atlantic S. S. Corp., supra,* and *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946), see *ante,* at 82–83, it did so not out of naked solicitude for shipowners and stevedores, but because this layering of recoveries failed to produce "a real increase in actual benefits for injured workers." S. Rep. No. 92–1125, p. 4 (1972), quoted *ante,* at 84. Yet the Court now advances this secondary purpose to justify a reduction of the longshoreman's recovery in the third-party negligence action that Congress retained primarily for his benefit; and it does so *because* proration of attorney's fees would result in a "real increase" in the longshoreman's total compensation. I cannot avoid the suspicion that congressional intent has been stood on its head.

The Court also makes much of the putative "windfall" a longshoreman would receive if petitioner prevailed. *Ante,* at 87. The longshoreman would receive no windfall. Any costs or fees he must pay reduce his net recovery below the amount of his adjudicated injuries. This deficit would be alleviated, but never exceeded, if the stevedore were charged with a proportionate share of the attorney's fees. The longshoreman, of course, would be better off than if he had to depend either on the statutory compensation or on the negligence suit alone. But Congress long ago eliminated the necessity of electing a remedy, and an increase in total recovery accomplished by resort to both methods of redress is fully consistent with the statutory scheme. So long as the longshoreman's total compensation remains less than his actual damages, there is no true "double recovery."

To use the Court's own adjective, *ante,* at 85, it is "ironic" that from this litigation petitioner will receive, by today's ruling, only $2,779.57 more than the attorney's fees of $19,932.40. The Court thus acts to ensure that third-party actions will remain, as they were before the 1972 Amendments, a litigation playground for others instead of a method by which the injured longshoreman realistically may hope to

recover for losses that are not covered by the statutory compensation scheme. I shall be interested to see whether the Court adheres to its present logic when presented with a case where the third-party recovery is so small that virtually nothing is left for the longshoreman. Where the recovery against the shipowner is less than the stevedore's lien and the expenses of the suit, see *ante*, at 86–87, n. 13, it is to be hoped that the injured longshoreman will not be required to disgorge part of his compensation payments. Yet such disgorgement would not be inconsistent with the gloss on congressional priorities that the Court imposes today.

Syllabus

# CALIFORNIA RETAIL LIQUOR DEALERS ASSN. *v.* MIDCAL ALUMINUM, INC., ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

No. 79-97. Argued January 16, 1980—Decided March 3, 1980

A California statute requires all wine producers and wholesalers to file fair trade contracts or price schedules with the State. If a producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule and are prohibited from selling wine to a retailer at other than the price set in a price schedule or fair trade contract. A wholesaler selling below the established prices faces fines or license suspension or revocation. After being charged with selling wine for less than the prices set by price schedules and also for selling wines for which no fair trade contract or schedule had been filed, respondent wholesaler filed suit in the California Court of Appeal asking for an injunction against the State's wine pricing scheme. The Court of Appeal ruled that the scheme restrains trade in violation of the Sherman Act, and granted injunctive relief, rejecting claims that the scheme was immune from liability under that Act under the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341, and was also protected by § 2 of the Twenty-first Amendment, which prohibits the transportation or importation of intoxicating liquors into any State for delivery or use therein in violation of the State's laws.

*Held:*

1. California's wine pricing system constitutes resale price maintenance in violation of the Sherman Act, since the wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. And the State's involvement in the system is insufficient to establish antitrust immunity under *Parker* v. *Brown*, *supra*. While the system satisfies the first requirement for such immunity that the challenged restraint be "one clearly articulated and affirmatively expressed as state policy," it does not meet the other requirement that the policy be "actively supervised" by the State itself. Under the system the State simply authorizes price setting and enforces the prices established by private parties, and it does not establish prices, review the reasonableness of price schedules, regulate the terms of fair trade contracts, monitor market conditions, or engage in any "pointed reexamination"

of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. Pp. 102–106.

2. The Twenty-first Amendment does not bar application of the Sherman Act to California's wine pricing system. Pp. 106–114.

(a) Although under that Amendment States retain substantial discretion to establish liquor regulations over and above those governing the importation or sale of liquor and the structure of the liquor distribution system, those controls may be subject to the federal commerce power in appropriate situations. Pp. 106–110.

(b) There is no basis for disagreeing with the view of the California courts that the asserted state interests behind the resale price maintenance system of promoting temperance and protecting small retailers are less substantial than the national policy in favor of competition. Such view is reasonable and is supported by the evidence, there being nothing to indicate that the wine pricing system helps sustain small retailers or inhibits the consumption of alcohol by Californians. Pp. 110–114.

90 Cal. App. 3d 979, 153 Cal. Rptr. 757, affirmed.

POWELL, J., delivered the opinion of the Court, in which all other Members joined, except BRENNAN, J., who took no part in the consideration or decision of the case.

*William T. Chidlaw* argued the cause and filed briefs for petitioner.

*Jack B. Owens* argued the cause for respondent Midcal Aluminum, Inc. With him on the brief were *Elliot S. Kaplan* and *Frank C. Damrell, Jr.*

*George J. Roth,* Deputy Attorney General of California, argued the cause for the State of California as *amicus curiae* urging reversal. With him on the brief was *George Deukmejian,* Attorney General.*

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**W. Curtis Sewell* filed a brief for the Virginia Beer Wholesalers Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Assistant Attorney General Shenefield, Deputy Solicitor General Wallace, Elinor Hadley Stillman, Barry Grossman, Ron M. Landsman,* and

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

## I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file fair trade contracts or price schedules with the State.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that producer's brands. § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." § 24862 (West Supp. 1980).

The State is divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. §§ 24862, 24864, 24865 (West Supp. 1980). Similarly, state

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*Michael N. Sohn* for the United States; and by *A. Kirk McKenzie* for Consumers Union of United States, Inc.

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." Cal. Bus. & Prof. Code Ann. § 24866 (West 1964).

regulations provide that the wine prices posted by a single wholesaler within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 760 (1979). A licensee selling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code Ann. § 24880 (West Supp. 1980).[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc., is a wholesale distributor of wine in southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E. & J. Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then filed a writ of mandate in the California Court of Appeal for the Third Appellate District asking for an injunction against the State's wine pricing system.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C. § 1 *et seq.* The court relied entirely on the reasoning in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the court held that because the State played only a passive part in liquor pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The

[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damages suits for unfair competition. § 24752 (West 1964).

> prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

*Rice* also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California system not only permitted vertical control of prices by producers, but also frequently resulted in horizontal price fixing. Under the program, many comparable brands of liquor were marketed at identical prices.[3] Referring to congressional and state legislative studies, the court observed that resale price maintenance has little positive impact on either temperance or small retail stores. See *infra*, at 112–113.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from

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[3] The court cited record evidence that in July 1976 five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of Scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d, at 454, and nn. 14, 16, 579 P. 2d, at 491–492, and nn. 14, 16.

this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, 444 U. S. 824 (1979), and now affirm the decision of the state court.

## II

The threshold question is whether California's plan for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 407 (1911), the Court observed that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, however, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price

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[4] The State also did not appeal the decision in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

[6] The congressional Reports accompanying the Consumer Goods Pricing Act of 1975 noted that repeal of fair trade authority would not alter

maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *Herald Co., supra; Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,

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whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, p. 2 (1975); H. R. Rep. No. 94-341, p. 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See *supra*, at 101, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the State Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the Governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Ibid.* In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge be-

cause they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977).

Only last Term, this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). That program provided that the State would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership. *Id.*, at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[8] The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate

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[8] See *Norman's On the Waterfront, Inc.* v. *Wheatley*, 444 F. 2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd.* v. *FTC*, 263 F. 2d 502, 509–510 (CA4 1959); Note, *Parker v. Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum. L. Rev. 898, 916 (1977).

the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

## III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that Amendment repealed the Eighteenth Amendment's prohibition on the manufacture, sale, or transportation of liquor. The second section reserved to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

### A

In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the

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[9] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4–15, 4–28 (1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown*, since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); see *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63 (1936).

provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra*, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); two others

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[10] The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its ratification in the state conventions. The Senate sponsor of the Amendment resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that § 2 was designed only to ensure that "dry" States could not be forced by the Federal Government to permit the sale of liquor. See 76 Cong. Rec., at 4140–4141. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market*, *supra*, at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341 (1964). Nor can they insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren*, 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1971).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *William Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey-labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977. And in *Ziffrin, Inc.* v. *Reeves*, *supra*, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. 308 U. S., at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren*, *supra*, at 206.[11]

This pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a

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[11] In *Nippert* v. *Richmond*, 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

program similar in many respects to the California system at issue here. The Court held that because the Louisiana statute violated the Sherman Act, it could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Joseph E. Seagram & Sons, Inc.* v. *Hostetter, supra.* The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent enforcement of the Sherman Act" against an interstate conspiracy to fix liquor prices. *Id.*, at 45–46. See *Burke* v. *Ford,* 389 U. S. 320 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp., supra,* at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

*United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972).

See *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 4 (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 760, and in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d, at 451, 579 P. 2d, at 490.[12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the

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[12] As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See *supra*, at 101–102; Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Retail Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state-court opinions cited in text.

absence of "exceptional circumstances." *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 760. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Policies, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." 21 Cal. 3d, at 457–458, 579 P. 2d, at 494.[14]

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 579 P. 2d, at 493.[15] In gauging this interest, the court

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[13] The California Court of Appeal found no additional state interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

[15] The California Supreme Court also stated that orderly market conditions might "reduce excessive consumption, thereby encouraging temper-

adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 percent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94–466, p. 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see *supra*, at 102, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal came to the same conclusion with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 760.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers

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ance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was considered by the court as an independent state interest in resale price maintenance for liquor.

ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

*Affirmed.*

MR. JUSTICE BRENNAN did not take part in the consideration or decision of this case.

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[16] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.

Syllabus

# UNITED STATES *v.* APFELBAUM

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78–972. Argued December 3, 1979—Decided March 3, 1980

After initially invoking his Fifth Amendment privilege against self-incrimination while being questioned before a federal grand jury, respondent ultimately testified when the Government granted him immunity in accordance with 18 U. S. C. § 6002, which provides that when a witness is compelled to testify over his claim of a Fifth Amendment privilege, no testimony or other information compelled under the order to testify may be used against the witness in any criminal case, "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." Respondent was later indicted and convicted under 18 U. S. C. § 1623 (a) (1976 ed., Supp. II) for false swearing in his grand jury testimony with regard to certain statements. At trial, respondent objected to the use of any of his immunized testimony except the portions charged in the indictment as false, but the District Court admitted other portions of the testimony as being relevant to prove that he had knowingly made the charged false statements. The Court of Appeals reversed, holding that because such immunized testimony did not constitute the "*corpus delicti*" or "core" of the false-statements offense, it could not be introduced.

*Held:* Because proper invocation of the Fifth Amendment privilege against self-incrimination allows a witness to remain silent, but not to swear falsely, neither § 6002 nor the Fifth Amendment precludes the use of respondent's immunized grand jury testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence. Pp. 121–132.

(a) Section 6002's language makes no distinction between truthful and untruthful statements made during the course of immunized testimony, but, rather, creates a blanket exemption from the bar against the use of such testimony where the witness is subsequently prosecuted for making false statements. And § 6002's legislative history shows that Congress intended the perjury and false-declarations exception to be interpreted as broadly as constitutionally permissible. Thus, it is evident that Congress intended to permit the use of both truthful and false statements made during the course of immunized testimony if such use was not prohibited by the Fifth Amendment. Pp. 121–123.

(b) It is analytically incorrect to equate the benefits of remaining silent as a result of invocation of the Fifth Amendment privilege with the protections conferred by the privilege—protections that may be invoked with respect to matters that pose substantial and real hazards of subjecting a witness to criminal liability at the time he asserts the privilege. For a grant of immunity to provide protection "coextensive" with that of the Fifth Amendment, it need not treat the witness as if he had remained silent. Here, the Fifth Amendment does not prevent the use of respondent's immunized testimony at his trial for false swearing because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give. Pp. 123–132.

584 F. 2d 1264, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 132. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 133.

*William C. Bryson* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Frey, Sidney M. Glazer,* and *Vincent L. Gambale.*

*Joel Harvey Slomsky* argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Apfelbaum invoked his privilege against compulsory self-incrimination while being questioned before a grand jury in the Eastern District of Pennsylvania. The Government then granted him immunity in accordance with 18 U. S. C. § 6002, and he answered the questions propounded to him. He was then charged with and convicted of making false statements in the course of those answers.[1] The Court

[1] Title 18 U. S. C. § 1623 (a) (1976 ed., Supp. II) provides in pertinent part:

"Whoever under oath . . . in any proceeding before . . . [a] grand jury of the United States knowingly makes any false material declara-

of Appeals reversed the conviction, however, because the District Court had admitted into evidence relevant portions of respondent's grand jury testimony that had not been alleged in the indictment to constitute the *"corpus delicti"* or "core" of the false-statements offense. Because proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely, we hold that neither the statute nor the Fifth Amendment requires that the admissibility of immunized testimony be governed by any different rules than other testimony at a trial for making false statements in violation of 18 U. S. C. § 1623 (a) (1976 ed., Supp. II). We therefore reverse the judgment of the Court of Appeals.

## I

The grand jury had been investigating alleged criminal activities in connection with an automobile dealership located in the Chestnut Hill section of Philadelphia. The investigation focused on a robbery of $175,000 in cash that occurred at the dealership on April 16, 1975, and on allegations that two officers of the dealership staged the robbery in order to repay loan-shark debts.[2] The grand jury also heard testimony that the officers were making extortionate extensions of credit through the Chestnut Hill Lincoln-Mercury dealership.

In 1976, respondent Apfelbaum, then an administrative assistant to the District Attorney in Philadelphia, was called to testify because it was thought likely that he was an aider or abettor or an accessory after the fact to the allegedly staged robbery. When the grand jury first sought to question him about his relationship with the two dealership officials sus-

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tion . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2] One of the officers was subsequently convicted of collecting extensions of credit by extortionate means in violation of 18 U. S. C. § 894, mail fraud in violation of 18 U. S. C. § 1341, racketeering in violation of 18 U. S. C. § 1962, and conspiracy in violation of 18 U. S. C. § 371.

pected of the staged robbery, he claimed his Fifth Amendment privilege against compulsory self-incrimination and refused to testify. The District Judge entered an order pursuant to 18 U. S. C. § 6002 granting him immunity and compelling him to testify.[3] Respondent ultimately complied with this order to testify.[4]

During the course of his grand jury testimony, respondent made two series of statements that served as the basis for his subsequent indictment and conviction for false swearing. The first series was made in response to questions concerning whether respondent had attempted to locate Harry Brown, one of the two dealership officials, while on a "fishing trip" in Ft. Lauderdale, Fla., during the month of December 1975. Respondent testified that he was "positive" he had not attempted to locate Brown, who was also apparently in the Ft. Lauderdale area at the time. In a second series of statements, respondent denied that he had told FBI agents that he had lent $10,000 to Brown. The grand jury later indicted respond-

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[3] Title 18 U. S. C. § 6002 provides:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

"and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

[4] After the issuance of the immunity order, respondent had still refused to testify before the grand jury. He agreed to testify after being held in civil contempt under 28 U. S. C. § 1826 and confined for six days.

ent pursuant to 18 U. S. C. § 1623 (a) (1976 ed., Supp. II) for making these statements, charging that the two series of statements were false and that respondent knew they were false.

At trial, the Government introduced into evidence portions of respondent's grand jury testimony in order to put the charged statements in context and to show that respondent knew they were false. The excerpts concerned respondent's relationship with Brown, his 1976 trip to Florida to visit Brown, the discussions he had with Brown on that occasion, and his denial that he had financial dealings with the automobile dealership in Philadelphia or had cosigned a loan for Brown. Respondent objected to the use of all the immunized testimony except the portions charged in the indictment as false. The District Court overruled the objection and admitted the excerpts into evidence on the ground that they were relevant to prove that respondent had knowingly made the charged false statements. The jury found respondent guilty on both counts of the indictment.

The Court of Appeals for the Third Circuit reversed, holding that because the immunized testimony did not constitute "the *corpus delicti* or core of a defendant's false swearing indictment" it could not be introduced. 584 F. 2d 1264, 1265 (1978). We granted certiorari because of the importance of the issue and because of a difference in approach to it among the Courts of Appeals.[5] 440 U. S. 957 (1979).

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[5] The Seventh Circuit agrees with the Court of Appeals below that the Government may introduce into evidence so much of the witness' testimony as is essential to establish the *corpus delicti* of the offense of perjury. *United States* v. *Patrick*, 542 F. 2d 381, 385 (1976). The Second and Tenth Circuits have held that false immunized testimony is admissible, but truthful immunized testimony is not, in a subsequent prosecution for perjury. *United States* v. *Dunn*, 577 F. 2d 119, 125–126 (CA10 1978), rev'd on other grounds, 442 U. S. 100 (1979); *United States* v. *Berardelli*, 565 F. 2d 24, 28 (CA2 1977); *United States* v. *Moss*, 562 F. 2d 155, 165 (CA2 1977), cert. denied, 435 U. S. 914 (1978); *United States* v. *Housand*,

The differing views that this question has elicited from the Courts of Appeals are not surprising, because there are considered statements in one line of cases from this Court, and both statements and actual holdings in another line of cases, that as a matter of strict and literal reading cannot be wholly reconciled.[6] Though most of the decisions of the Courts of

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550 F. 2d 818, 822 (CA2 1977); *United States* v. *Kurzer*, 534 F. 2d 511, 518 (CA2 1976). The Sixth and Eighth Circuits have held that immunized testimony may be used for any purpose in such a prosecution. *Daniels* v. *United States*, 196 F. 459, 462–463 (CA6 1912); *Edelstein* v. *United States*, 149 F. 636, 642–644 (CA8 1906).

[6] A principal reason for this divergence in approach originates in the statement in *Counselman* v. *Hitchcock*, 142 U. S. 547, 585 (1892), that an immunity statute "cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." This language was reiterated only last Term in *New Jersey* v. *Portash*, 440 U. S. 450, 456–457 (1979).

As discussed in Part III, *infra*, strictly speaking even a "transactional" immunity statute, to say nothing of a "use" immunity statute, does not conform to this definition: The mere grant of immunity and consequent compulsion to testify places a witness asserting his Fifth Amendment privilege in the dilemma of having to decide whether to answer the questions truthfully or falsely, a dilemma he never would have faced had he simply been permitted to remain silent upon the invocation of his privilege. Yet properly drawn immunity statutes have long been recognized as valid in this country. *Infra*, at 125. And it is likewise well established that one may be prosecuted for making false statements while giving immunized testimony. *Infra*, at 126–127.

A source of further difficulty for the Courts of Appeals is language from our recent decisions that, if taken literally, would preclude the introduction of immunized testimony even for the purpose of establishing the "*corpus delicti*" or core of the perjury offense. In *Kastigar* v. *United States*, 406 U. S. 441, 453 (1972), in which we upheld the constitutionality of this immunity statute against a challenge that it did not provide protection coextensive with the Fifth Amendment, we said that it "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." And in *New Jersey* v. *Portash*, *supra*, at 459, we stated that under the Fifth and Fourteenth Amendments "a defendant's compelled statements . . . may not be put to any testimonial use whatever against him in a criminal trial. '. . . [*A*]*ny* criminal trial use against a

Appeals turn on the interaction between perjury and immunity statutes enacted by Congress and the privilege against compulsory self-incrimination conferred by the Fifth Amendment to the United States Constitution, it is of course our first duty to decide whether the statute relied upon in this case to sustain the conviction of respondent may properly be interpreted to do so. We turn now to decision of that question.

## II

Did Congress intend the federal immunity statute, 18 U. S. C. § 6002, to limit the use of a witness' immunized grand jury testimony in a subsequent prosecution of the witness for false statements made at the grand jury proceeding? Respondent contends that while § 6002 permits the use of a witness' false statements in a prosecution for perjury or for making false declarations, it establishes an absolute prohibition against the use of truthful immunized testimony in such prosecutions. But this contention is wholly at odds with the explicit language of the statute, and finds no support even in its legislative history.

It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language. Here 18 U. S. C. § 6002 provides that when a witness is compelled to testify over his claim of a Fifth Amendment privilege, "no testimony or other information compelled under the order (or any information directly or indirectly derived from

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defendant of his *involuntary* statement is a denial of due process of law.'" (Emphasis in original.)

Doubtless as a result of these divergent holdings and statements none of the Court of Appeals decisions referred to in footnote 5, *supra*, holds that *false* immunized testimony may not form the basis for a prosecution for perjury or false swearing, but they differ as to how much of the relevant immunized testimony other than that asserted by the Government to be false may be introduced in such a prosecution.

such testimony or other information) may be used against the witness in any criminal case, *except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.*" (Emphasis added.) The statute thus makes no distinction between truthful and untruthful statements made during the course of the immunized testimony. Rather, it creates a blanket exemption from the bar against the use of immunized testimony in cases in which the witness is subsequently prosecuted for making false statements.

The legislative history of § 6002 shows that Congress intended the perjury and false-declarations exception to be interpreted as broadly as constitutionally permissible. The present statute was enacted as a part of the Organized Crime Control Act of 1970,[7] after a re-examination of the broad transactional immunity statute enacted in response to this Court's decision in *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892). See *Kastigar* v. *United States,* 406 U. S. 441, 452, and n. 36 (1972). Its design was not only to bring about uniformity in the operation of immunity grants within the federal system,[8] but also to restrict the grant of immunity to that required by the United States Constitution. Thus, the statute derives from a 1969 report of the National Commission on the Reform of the Federal Criminal Laws, which proposed a general use immunity statute under which "the immunity conferred would

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[7] Pub. L. 91–452, § 201 (a), 84 Stat. 926. The purpose of the Act was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 923.

[8] See, *e. g.,* Measures Relating to Organized Crime, Hearings on S. 30, etc., before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 282–284 (1969) (remarks of Representative Poff and Senator McClellan). At the time the new statute was being considered, there were more than 50 separate federal immunity statutes. *Id.,* at 282.

be confined to the scope required by the Fifth Amendment." [9] And as stated in both the Senate and House Reports on the proposed legislation:

> "This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. . . . It is designed to reflect the use-restriction immunity concept of *Murphy* v. *Waterfront Commission,* 378 U. S. 52 (1964) rather [than] the transaction immunity concept of *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892)." [10]

In light of the language and legislative history of § 6002, the conclusion is inescapable that Congress intended to permit the use of both truthful and false statements made during the course of immunized testimony if such use was not prohibited by the Fifth Amendment.

## III

The limitation placed on the use of relevant evidence by the Court of Appeals may be justified, then, only if required by the Fifth Amendment. Respondent contends that his conviction was properly reversed because under the Fifth Amendment his truthful immunized statements were inadmissible at his perjury trial, and the Government never met its burden of showing that the immunized statements it introduced into evidence were not truthful. The Court of Appeals, as noted

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[9] Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, reproduced in Hearings on S. 30, *supra* n. 8, at 292. See also *id.,* at 15, 326; National Commission on Reform of Federal Criminal Laws, Working Papers 1405 (1970).

[10] S. Rep. No. 91–617, p. 145 (1969); H. R. Rep. No. 91–1549 p. 42 (1970). Representative Poff, the bill's chief sponsor in the House, quoted MR. JUSTICE WHITE's observation in *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 107 (1964), that "'[i]mmunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination.'" 116 Cong. Rec. 35291 (1970). We express no opinion as to the possible intimation in the Reports that the Fifth Amendment would have prohibited an immunity statute any broader than § 6002.

above, concluded that the Fifth Amendment prohibited the use of all immunized testimony except the "*corpus delicti*" or "core" of the false swearing indictment.

In reaching its conclusion, the Court of Appeals initially observed that a grant of immunity must be coextensive with the Fifth Amendment. *Kastigar* v. *United States*, *supra*, at 449. It then reasoned that had respondent not been granted immunity, he would have been entitled under the Fifth Amendment to remain silent. And if he had remained silent, he would not have answered any questions, truthfully or falsely. There consequently would have been no testimony whatsoever to use against him. A prosecution for perjury committed at the immunized proceeding, the Court of Appeals continued, must be permitted because "as a practical matter, if immunity constituted a license to lie, the purpose of immunity would be defeated." Such a prosecution is but a "narrow exception" carved out to preserve the integrity of the truth-seeking process. But the subsequent use of statements made at the immunized proceeding, other than those alleged in the indictment to be false, is impermissible because the introduction of such statements cannot be reconciled with the privilege against self-incrimination. 584 F. 2d, at 1269–1271.

A

There is more than one flaw in this reasoning. Initially, it presumes that in order for a grant of immunity to be "coextensive with the Fifth Amendment privilege," the witness must be treated as if he had remained silent. This presumption focuses on the *effect* of the assertion of the Fifth Amendment privilege, rather than on the *protection* the privilege is designed to confer. In so doing, it calls into question the constitutionality of all immunity statutes, including "transactional" immunity statutes as well as "use" immunity statutes such as § 6002. Such grants of immunity would not provide a full and complete substitute for a witness' silence because, for example, they do not bar the use of the witness' state-

ments in civil proceedings. Indeed, they fail to prevent the use of such statements for any purpose that might cause detriment to the witness other than that resulting from subsequent criminal prosecution.

This Court has never held, however, that the Fifth Amendment requires immunity statutes to preclude all uses of immunized testimony. Such a requirement would be inconsistent with the principle that the privilege does not extend to consequences of a noncriminal nature, such as threats of liability in civil suits, disgrace in the community, or the loss of employment. See, *e. g.*, *Brown* v. *Walker*, 161 U. S. 591, 605–606 (1896); *Smith* v. *United States*, 337 U. S. 137, 147 (1949); *Ullmann* v. *United States*, 350 U. S. 422, 430–431 (1956); *Uniformed Sanitation Men Assn.* v. *Commissioner of Sanitation*, 392 U. S. 280, 284–285 (1968); *Gardner* v. *Broderick*, 392 U. S. 273, 279 (1968).

And this Court has repeatedly recognized the validity of immunity statutes. *Kastigar* v. *United States*, 406 U. S., at 449, acknowledged that Congress included immunity statutes in many of the regulatory measures adopted in the first half of this century, and that at the time of the enactment of 18 U. S. C. § 6002, the statute under which this prosecution was brought, there were in force over 50 federal immunity statutes as well as similar laws in every State of the Union. 406 U. S., at 447. This Court in *Ullmann* v. *United States*, *supra*, stated that such statutes have "become part of our constitutional fabric." 350 U. S., at 438. And the validity of such statutes may be traced in our decisions at least as far back as *Brown* v. *Walker*, *supra*.

These cases also establish that a strict and literal reading of language in cases such as *Counselman* v. *Hitchcock*, 142 U. S., at 585—that an immunity statute "cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect"—does not require the sort of "but for" analysis used by the Court of Appeals in order to enable it to survive

attack as being violative of the privilege against compulsory self-incrimination. Indeed, in *Brown* v. *Walker*, *supra*, at 600, this Court stated that "[t]he danger of extending the principle announced in *Counselman* v. *Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify." And in *Kastigar* v. *United States*, we concluded that "[t]he broad language in *Counselman* relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority." 406 U. S., at 454–455. *Kastigar* also expressly declined a request by the petitioner to reconsider and overrule *Brown* v. *Walker*, *supra*, and *Ullmann* v. *United States*, *supra*, and went on to expressly reaffirm the validity of those decisions.

The reasoning of the Court of Appeals is also internally inconsistent in that logically it would not permit a prosecution for perjury or false swearing committed during the course of the immunized testimony. If a witness must be treated as if he had remained silent, the mere requirement that he answer questions, thereby subjecting himself to the possibility of being subsequently prosecuted for perjury or false swearing, places him in a position that is substantially different from that he would have been in had he been permitted to remain silent.

All of the Courts of Appeals, however, have recognized that the provision in 18 U. S. C. § 6002 allowing prosecutions for perjury in answering questions following a grant of immunity does not violate the Fifth Amendment privilege against compulsory self-incrimination. And we ourselves have repeatedly held that perjury prosecutions are permissible for false answers to questions following the grant of immunity. See, *e. g.*, *United States* v. *Wong*, 431 U. S. 174 (1977); *United States* v. *Mandujano*, 425 U. S. 564 (1976) (plurality opinion); *id.*, at 584–585 (BRENNAN, J., concurring in judgment);

*id.*, at 609 (STEWART, J., joined by BLACKMUN, J., concurring in judgment).

It is therefore analytically incorrect to equate the benefits of remaining silent as a result of invocation of the Fifth Amendment privilege with the protections conferred by the privilege—protections that may be invoked with respect to matters that pose substantial and real hazards of subjecting a witness to criminal liability at the time he asserts the privilege. For a grant of immunity to provide protection "coextensive" with that of the Fifth Amendment, it need not treat the witness as if he had remained silent. Such a conclusion, as noted above, is belied by the fact that immunity statutes and prosecutions for perjury committed during the course of immunized testimony are permissible at all.

B

The principle that the Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury has frequently been cited without any elaboration as to its underlying rationale. See, *e. g.*, *Bryson* v. *United States*, 396 U. S. 64, 72 (1969); *United States* v. *Knox*, 396 U. S. 77, 82 (1969). Its doctrinal foundation, as relied on in both *Wong* and *Mandujano*, is traceable to *Glickstein* v. *United States*, 222 U. S. 139, 142 (1911). *Glickstein* stated that the Fifth Amendment "does not endow the person who testifies with a license to commit perjury," *ibid.*, and that statement has been so often repeated in our cases as to be firmly established constitutional law. But just as we have refused to read literally the broad dicta of *Counselman*, *supra*, we are likewise unwilling to decide this case solely upon an epigram contained in *Glickstein*, *supra*. Thus, even if, as the Court of Appeals said, a perjury prosecution is but a "narrow exception" to the principle that a witness should be treated as if he had remained silent, it does not follow that the Court of Appeals was correct in its view of the question before us now.

Perjury prosecutions based on immunized testimony, even if they be but a "narrow exception" to the principle that a witness should be treated as if he had remained silent after invoking the Fifth Amendment privilege, *are* permitted by our cases. And so long as they are, there is no principle or decision that limits the admissibility of evidence in a manner peculiar only to them. To so hold would not be an exercise in the balancing of competing constitutional rights, but in a comparison of apples and oranges.[11] For even if both truthful and untruthful testimony from the immunized proceeding are admissible in a subsequent perjury prosecution, the exception surely would still be properly regarded as "narrow," once it is recognized that the testimony remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant.

While the application of the Fifth Amendment privilege to various types of claims has changed in some respects over the past three decades, the basic test reaffirmed in each case has been the same.

> "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination. *Rogers* v. *United States,* 340 U. S. 367, 374; *Brown* v. *Walker,* 161 U. S. 591, 600." *Marchetti* v. *United States,* 390 U. S. 39, 53 (1968).

*Marchetti,* which overruled earlier decisions of this Court in *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), invalidated the fed-

[11] Thus, the Court of Appeals' position is basically a halfway house that does not withstand logical analysis. If the rule is that a witness who is granted immunity may be placed in no worse a position than if he had been permitted to remain silent, the principle that the Fifth Amendment does not protect false statements serves merely as a piece of a legal mosaic justified solely by *stare decisis,* rather than as part of a doctrinally consistent view of that Amendment.

eral wagering statutes at issue in *Kahriger* and *Lewis* on the ground that they contravened the petitioner's Fifth Amendment right against compulsory self-incrimination. The practical effect of the requirements of those statutes was to compel petitioner, a professional gambler engaged in ongoing gambling activities that he had commenced and was likely to continue, to choose between openly exposing himself as acting in violation of state and federal gambling laws and risking federal prosecution for tax avoidance.[12] The Court held that petitioner was entitled to assert his Fifth Amendment privilege in these circumstances. But it also observed that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." 390 U. S., at 54. Thus, although *Marchetti* rejected "the rigid chronological distinction adopted in *Kahriger* and *Lewis*," *id.*, at 53, that distinction does not aid respondent here.

In *United States* v. *Freed*, 401 U. S. 601 (1971), this Court rejected the argument that a registration requirement of the National Firearms Act violated the Fifth Amendment because the information disclosed could be used in connection with offenses that the transferee of the firearm might commit in the future. In so doing, the Court stated:

> "Appellees' argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a

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[12] Thus, the Court observed:

"Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt." 390 U. S., at 48.

And "[e]very aspect of petitioner's wagering activities," the Court continued, "subjected him to possible state or federal prosecution," and the "[i]nformation obtained as a consequence of the federal wagering tax laws is readily available to assist the efforts of state and federal authorities to enforce these penalties." *Id.*, at 47.

> person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation." *Id.*, at 606–607.

And MR. JUSTICE BRENNAN in his concurring opinion added:

> "I agree with the Court that the Self-Incrimination Clause of the Fifth Amendment does not require that immunity be given as to the use of such information in connection with crimes that the transferee might possibly commit in the future with the registered firearm." *Id.*, at 611.

In light of these decisions, we conclude that the Fifth Amendment does not prevent the use of respondent's immunized testimony at his trial for false swearing because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give. Respondent's assertion of his Fifth Amendment privilege arose from his claim that the questions relating to his connection with the Chestnut Hill auto dealership would tend to incriminate him. The Government consequently granted him "use" immunity under § 6002, which prevents the use and derivative use of his testimony with respect to any subsequent criminal case except prosecutions for perjury and false swearing offenses, in exchange for his compelled testimony.

The Government has kept its part of the bargain; this is a perjury prosecution and not any other kind of criminal prosecution. The Court of Appeals agreed that such a prosecution might be maintained, but as noted above severely limited the admissibility of immunized testimony to prove the Government's case. We believe that it could not be fairly said that respondent, at the time he asserted his privilege and was consequently granted immunity, was confronted with more than a "trifling or imaginary" hazard of compelled self-incrimination as a result of the possibility that he might com-

mit perjury during the course of his immunized testimony. In *United States* v. *Bryan*, 339 U. S. 323 (1950), we held that an immunity statute that provided that "[n]o testimony given by a witness before . . . any committee of either House . . . shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony," did not bar the use at respondent's trial for willful default of the testimony given by her before a congressional committee. In so holding, we stated that "[t]here is, in our jurisprudence, no doctrine of 'anticipatory contempt.'" *Id.*, at 341.

We hold here that in our jurisprudence there likewise is no doctrine of "anticipatory perjury." In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.[13] Similarly, a future intention to commit perjury or to make false statements if granted immunity because of a claim of compulsory self-incrimination is not by itself sufficient to create a "substantial and 'real'" hazard that permits invocation of the Fifth Amendment. *Brown* v. *Walker*, 161 U. S. 591 (1896); *Rogers* v. *United States*, 340 U. S. 367 (1951). Therefore, neither the immunity statute nor the Fifth Amendment precludes the use of respondent's immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence. The exception of a perjury prosecution from the prohibition against the use of immunized testimony may be a narrow

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[13] As recognized by one commentator, Shakespeare's lines here express sound legal doctrine:

"His acts did not o'ertake his bad intent;
And must be buried but as an intent
That perish'd by the way: thoughts are no subjects,
Intents but merely thoughts."

Measure for Measure, Act V, Scene 1; G. Williams, Criminal Law, The General Part 1 (2d ed. 1961).

one, but it is also a complete one. The Court of Appeals having held otherwise, its judgment is accordingly

*Reversed.*

MR. JUSTICE BRENNAN, concurring in the judgment.

The Fifth Amendment guarantees the right to be free from compulsory self-incrimination. It permits an individual to refuse to answer questions; but it does not give him the right to answer falsely. *United States* v. *Mandujano*, 425 U. S. 564, 584–585 (1976) (BRENNAN, J., concurring in judgment); *United States* v. *Wong*, 431 U. S. 174 (1977). When the Government compels testimony via a grant of immunity it is constitutionally required to place the victim in a position similar to the one he would have occupied had he exercised his Fifth Amendment privilege. The scope of immunity, in other words, must be "coextensive with the scope of the privilege." *Kastigar* v. *United States*, 406 U. S. 441, 449 (1972). This does not, however, bar a prosecution for perjury committed in the course of immunized testimony, even though such a prosecution will obviously place the witness in a worse position than he would have been in had he invoked the privilege. The perjury exception seems to have two sources. First, it stems from the aforementioned fact that prior to the immunity grant the witness had no Fifth Amendment right to answer falsely, and, second, it flows from the simple reality that affording the witness a right to lie with impunity would render the entire immunity transaction futile.

Because I think it follows from the logic and exigencies of the perjury exception that the Government should be permitted to introduce other portions of the immunized testimony to prove elements of the offense of perjury, I concur in the judgment reversing the decision of the Court of Appeals for the Third Circuit. And because I find this ground adequate to decide the present case I see no reason to explore the terrain which the majority probes via what is in one sense dicta.

More particularly, (1) I do not think that the present result compels the conclusion that there are no special constitutional constraints on the use to which immunized testimony may be put in a perjury prosecution, and (2) I am by no means persuaded that the result here would be correct were this a prosecution for false swearing occurring after the immunized testimony rather than in the course of it.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

I do not join the Court's opinion. I agree, however, that the Court of Appeals too narrowly confined the use of immunized testimony in the prosecution of respondent for giving false testimony. I do not fully subscribe to the Court's holding that "neither the statute nor the Fifth Amendment requires that the admissibility of immunized testimony be governed by any different rules than other testimony at a trial for making false statements." *Ante*, at 117. And I do not fully agree with the Court's conclusion that the practical effect of asserting the privilege against self-incrimination is an unimportant factor in determining whether a grant of immunity is coextensive with Fifth Amendment protection. See *ante*, at 125. I therefore concur only in the judgment.

The Court's statement of its holding troubles me primarily for two reasons. First, it apparently makes no distinction between a prosecution for false testimony given under a grant of immunity and a prosecution for false testimony in other contexts. This case concerns the use of immunized testimony to prove that respondent made contemporaneous false statements. There is no occasion to determine whether the immunized testimony could have been used to prove perjury or false statements occurring at some other time. The Court thus states its holding in language that is broader than necessary. At the moment, I am not prepared to go so far.

Second, I am not sure I agree that the use of immunized

testimony in perjury prosecutions requires no special analysis with respect to the usual rules of evidence. How the testimony is to be used may well be an important factor in determining whether the protection against self-incrimination has been honored. For example, a witness' truthful admission of prior perjury conceivably might be protected from use even though independent evidence of such a prior similar crime were admissible. Again, I would prefer to await further developments before deciding this question.

Perhaps a more fundamental reservation about the Court's opinion concerns its attempted distinction between, on the one hand, the protection afforded by the privilege against self-incrimination and, on the other, the effect of the invocation of the privilege. Since the privilege itself is *defined* in terms of the incriminating effect of truthful testimony, it does not seem irrational to weigh alternative methods for protecting this constitutional right in terms of their effect as well. As the Court demonstrates, *ante*, at 124–125, a grant of immunity may be a constitutionally adequate response to invocation of the privilege without perfectly replicating the effect of total silence, at least where a civil use of the testimony is concerned. But that observation, for me, does not obviate the relevance of a comparison between silence and immunity in determining whether the protection afforded by the latter ensures that the privilege against self-incrimination has been properly preserved. Whether as a matter of logic, history, or experience, it does not follow that an analogy is robbed of all force merely because it is not always or singly controlling in every imaginable circumstance. Compare *Kastigar* v. *United States*, 406 U. S. 441, 449 (1972), and *Ullmann* v. *United States*, 350 U. S. 422, 438 (1956), with *ante*, at 127–128. See also O. Holmes, The Common Law 1 (1881). The Court's cases long have regarded the right to remain silent in the face of compelled incrimination as a touchstone for Fifth Amendment protection. See *Kastigar* v. *United States*, 406 U. S., at 461; *Brown* v. *Walker*, 161 U. S.

591, 596–597 (1896). The Court may be prepared now to deviate from that course; I am not so prepared.

Nonetheless, I remain convinced that "[t]he Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury." *United States* v. *Mandujano*, 425 U. S. 564, 609 (1976) (opinion concurring in judgment). The privilege operates only to protect the witness from compulsion of *truthful* testimony of an incriminating nature. Perjury or the making of false statements under a grant of immunity thus violates a basic assumption upon which the privilege and hence the immunity depend. Preserving the integrity of the immunity "bargain," *ante*, at 130, by allowing the use of immunized testimony for the limited purpose of proving that the terms of immunity have been criminally breached, is an integral part of the "rational accommodation between the imperatives of the privilege and the legitimate demands of government" upon which the entire theory of immunity rests. *Kastigar* v. *United States*, 406 U. S., at 446. See *Glickstein* v. *United States*, 222 U. S. 139, 141 (1911); *United States* v. *Tramunti*, 500 F. 2d 1334, 1342 (CA2), cert. denied, 419 U. S. 1079 (1974). Prosecutions for perjury or making false statements differ in this respect from all other instances in which, but for the grant of immunity, the witness' testimony might be used. It is for this reason, in my view, that they have been regarded as "a 'narrow exception' to the principle that a witness should be treated as if he had remained silent after invoking the Fifth Amendment privilege." *Ante*, at 128. Since I find this ground sufficient to dispose of the present case, I need not decide at this juncture whether I fully agree with what seem to be the broader implications of the Court's analysis and opinion.

# KISSINGER *v.* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78–1088. Argued October 31, 1979—Decided March 3, 1980*

Henry Kissinger served as an Assistant to the President for National Security Affairs from 1969 to 1975 and as Secretary of State from 1973 to 1977. Throughout these periods, his secretaries monitored his telephone conversations and recorded their contents either by shorthand or on tape. The stenographic notes or tapes were used to prepare summaries and sometimes verbatim transcripts of the conversations (hereafter notes or telephone notes). In 1976, after the notes had been moved from Kissinger's office in the State Department to a private estate in New York, he donated them to the Library of Congress, subject to an agreement restricting public access to them for a specified period, and they were transported to the Library. Three requests for the notes were made to the State Department under the Freedom of Information Act (FOIA): (1) a request by a newspaper columnist (Safire), at a time when the notes were still located in Kissinger's State Department office, for any notes covering certain dates in which Safire's name appeared or in which Kissinger discussed information "leaks" with certain White House officials; (2) a request by the Military Audit Project, after the notes had been transferred to the Library of Congress, for all notes made while Kissinger was Secretary of State; and (3) a request at about the same time by the Reporters Committee for Freedom of the Press and others for notes made both while Kissinger was Presidential Assistant and while he was Secretary of State. The State Department denied the first request on the ground that the requested notes had been made while Kissinger was Presidential Assistant and therefore were not agency records subject to FOIA disclosure. The second and third requests were denied on the grounds both that the requested notes were not agency records and that their deposit with the Library of Congress prior to the requests terminated the State Department's custody and control. During this period when he was no longer Secretary of State, Kissinger refused the Government Archivist's

*Together with No. 78–1217, *Reporters Committee for Freedom of the Press et al.* v. *Kissinger*, also on certiorari to the same court.

requests for return of the notes. Suits were filed by the various FOIA requesters against Kissinger, the Library of Congress, the Secretary of State, and the State Department, seeking enforcement of the FOIA requests and a declaratory judgment that the telephone notes were agency records that had been unlawfully removed and were being improperly withheld. The District Court ruled in the plaintiffs' favor as to the notes made while Kissinger was Secretary of State but denied relief as to the notes made while he was Presidential Assistant, finding that the former notes were "agency records" subject to disclosure under the FOIA, and that Kissinger had wrongfully removed them from the State Department in violation of the Federal Records Disposal Act. An order was entered requiring the Library of Congress to return the Secretary of State notes to the State Department and requiring the Department to determine which of the notes are exempt from disclosure under the FOIA and to provide the required materials to the plaintiffs. The Court of Appeals affirmed.

*Held:*

1. The District Court had no authority to order transfer of the notes, including those made while Kissinger was Secretary of State, from the Library of Congress to the State Department at the behest of the named plaintiffs. Pp. 146–155.

(a) No provision of either the Federal Records Act of 1950, which establishes a records management program for federal agencies, or the complementary Records Disposal Act, which provides the exclusive means for record disposal, expressly confers a right of action on private parties nor can such a right of action be implied. The language of these Acts merely "proscribes certain conduct" and does not "create or alter civil liabilities," *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19, and the Records Act also expressly provides administrative remedies for violations of the Act. Moreover, the legislative history of the Acts confirms that congressional silence as to a private right of action was purposeful, indicating that their purpose was not to benefit private parties but solely to benefit the agencies themselves and the Federal Government as a whole. Thus, regardless of whether Kissinger had violated these Acts, Congress has not vested federal courts with jurisdiction to adjudicate that question upon suit by a private party, such responsibility being vested in the administrative authorities. Pp. 147–150.

(b) Nor does the FOIA furnish the congressional intent to permit private actions to recover records wrongfully removed from Government custody. Under this Act, federal jurisdiction is dependent upon a showing that an agency has (1) "improperly" (2) "withheld" (3) "agency

records." Here, the State Department, a covered agency, has not "withheld" agency records within the meaning of the FOIA, since Congress did not mean that an agency improperly withholds a document that has been removed from the agency's possession prior to the filing of the FOIA request, the agency in such case having neither the custody nor control necessary to enable it to withhold. And an agency's failure to sue a third party to obtain possession is not a withholding under the Act. This conclusion that possession or control is a prerequisite to FOIA disclosure is reinforced by an examination of the Act's purposes, from which it is apparent that Congress never intended, when it enacted the FOIA, to displace the statutory scheme embodied in the Federal Records and Records Disposal Acts providing for administrative remedies to safeguard against wrongful removal of agency records as well as to retrieve wrongfully removed records. Pp. 150–154.

(c) Under the circumstances of this case where Kissinger had refused the Archivist's requests for return of the documents and he and the Library of Congress as his donee are holding the documents in question under a claim of right, the State Department cannot be said to have had possession or control of the documents at the time the requests were received, and, therefore, it did not withold any agency records, an indispensable prerequisite to liability in a suit under the FOIA. Pp. 154–155.

2. Safire's request sought disclosure of documents that were not "agency records" within the meaning of the FOIA. While the FOIA makes the "Executive Office of the President" an agency subject to the Act, the legislative history makes it clear that the "Executive Office" does not include the Office of the President. Thus, since Safire's request sought notes made by Kissinger while acting in his capacity as Presidential Assistant, the requested notes were not "agency records" when they were made. Pp. 155–157.

191 U. S. App. D. C. 213, 589 F. 2d 1116, affirmed in part and reversed in part.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and POWELL, JJ., joined. BRENNAN, J., *post*, p. 158, and STEVENS, J., *post*, p. 161, filed opinions concurring in part and dissenting in part. MARSHALL, J., took no part in the consideration or decision of the cases. BLACKMUN, J., took no part in the decision of the cases.

*David Ginsburg* argued the cause for petitioner in No. 78–1088 and respondent in No. 78–1217. With him on the briefs

was *James E. Wesner*. *William Alsup* argued the cause for the federal parties in both cases. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Schiffer, Deputy Solicitor General Easterbrook,* and *Michael Kimmel.*

*Robert M. Sussman* argued the cause for the Reporters Committee for Freedom of the Press in both cases. With him on the brief were *Charles A. Horsky* and *Peter Barton Hutt*. *William A. Dobrovir* argued the cause for the Military Audit Project in both cases. With him on the brief was *Andra N. Oakes.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act (FOIA) vests jurisdiction in federal district courts to enjoin an "agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U. S. C. § 552 (a)(4)(B). We hold today that even if a document requested under the FOIA is wrongfully in the possession of a party not an "agency," the agency which received the request does not "improperly withhold" those materials by its refusal to institute a retrieval action. When an agency has demonstrated that it has not "withheld" requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the FOIA.

## I

This litigation arises out of FOIA requests seeking access to various transcriptions of petitioner Kissinger's telephone conversations. The questions presented by the petition necessitate a thorough review of the facts.

### A

Henry Kissinger served in the Nixon and Ford administrations for eight years. He assumed the position of Assistant

to the President for National Security Affairs in January 1969. In September 1973, Kissinger was appointed to the office of Secretary of State, but retained his National Security Affairs advisory position until November 3, 1975. After his resignation from the latter position, Kissinger continued to serve as Secretary of State until January 20, 1977. Throughout this period of Government service, Kissinger's secretaries generally monitored his telephone conversations and recorded their contents either by shorthand or on tape. The stenographic notes or tapes were used to prepare detailed summaries, and sometimes verbatim transcripts, of Kissinger's conversations.[1] Since Kissinger's secretaries generally monitored all of his conversations, the summaries discussed official business as well as personal matters. The summaries and transcripts prepared from the electronic or stenographic recording of his telephone conversations throughout his entire tenure in Government service were stored in his office at the State Department in personal files.

On October 29, 1976, while still Secretary of State, Kissinger arranged to move the telephone notes from his office in the State Department to the New York estate of Nelson Rockefeller. Before removing the notes, Kissinger did not consult the State Department's Foreign Affairs Document and Reference Center (FADRC), the center responsible for implementing the State Department's record maintenance and disposal program. Nor did he consult the National Archives and Records Service (NARS), a branch of the General Services Administration (GSA) which is responsible for records preservation throughout the Federal Government. Kissinger had obtained an opinion from the Legal Adviser of the Department of State, however, advising him that the telephone summaries were not agency records but were his personal

[1] Tapes and stenographic notes were always destroyed immediately after they were summarized or transcribed.

papers which he would be free to take when he left office.[2]

After Kissinger effected this physical transfer of the notes, he entered into two agreements with the Library of Congress deeding his private papers. In the first agreement, dated November 12, 1976, Kissinger deeded to the United States, in care of the Library of Congress, one collection of papers. Kissinger's telephone notes were not included in this collection. The agreement established terms obligating Kissinger to comply with certain restrictions on the inclusion of official documents in the collection and obligating the Library to respect restrictions on access. The agreement required that official materials in the collection would consist of "copies of government papers of which there is an original or record copy in government files." It also provided that all such materials must have been "approved for inclusion in the Collection" by "authorized officials."

Public access to the collection, under the terms of the deed, will not begin until 25 years after the transfer or 5 years after Kissinger's death, whichever is later. Until that time, access is restricted to (1) employees of the Library of Congress who have been jointly approved by the Library of Congress and Mr. Kissinger; (2) persons who have received the written permission of Mr. Kissinger; and (3) after Kissinger's death, persons who have received the written permission of a committee to be named in his will. Kissinger and all of his research assistants who have appropriate security clearance retain unrestricted access to the collection.

After this agreement was executed, the Department of State formulated procedures for the review of the documents and their transfer to the Library of Congress. Employees reviewed the collection and retained (a) original or record copies

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[2] This conclusion was premised on the Adviser's finding that the notes were covered by a Department regulation providing that a retiring official may retain papers "explicitly designated or filed as personal at the time of origin or receipt." 5 FAM § 417.1 (a) (1974).

of documents belonging to the agency, and (b) any materials containing classified information. In the donation process, Kissinger was also required to sign the Department's Standard Separation Statement affirming that he had "surrendered to responsible officials . . . documents or material containing classified or administratively controlled information furnished . . . during the course of [Government] employment or developed as a consequence thereof, including any diaries, memorandums of conversations, or other documents of a personal nature. . . ."

On December 24, 1976, by a second deed, Kissinger donated a second collection consisting of his telephone notes. This second agreement with the Library of Congress incorporated by reference all of the terms and conditions of the first agreement. It provided in addition, however, that public access to the transcripts would be permitted only with the consent, or upon the death, of the other parties to the telephone conversations in question.

On December 28, 1976, the transcripts were transported directly to the Library from the Rockefeller estate. Thus the transcripts were not reviewed by the Department of State Document and Reference Center with the first collection of donated papers before they were delivered into the possession of the Library of Congress. Several weeks after they were moved to the Library, however, one of Kissinger's personal aides did extract portions of the transcripts for inclusion in the files of the State Department and the National Security Council. Pursuant to the instructions of the State Department Legal Adviser, the aide included in the extracts, "any significant policy decisions or actions not otherwise reflected in the Department's records."

## B

Three separate FOIA requests form the basis of this litigation. All three requests were filed while Kissinger was Secretary of State, but only one request was filed prior to the

removal of the telephone notes from the premises of the State Department. This first request was filed by William Safire, a New York Times columnist, on January 14, 1976. Safire requested the Department of State to produce any transcripts of Kissinger's telephone conversations between January 21, 1969, and February 12, 1971, in which (1) Safire's name appeared or (2) Kissinger discussed the subject of information "leaks" with certain named White House officials. The Department denied Safire's FOIA request by letter of February 11, 1976. The Department letter reasoned that the requested notes had been made while Kissinger was National Security Adviser and therefore were not agency records subject to FOIA disclosure.[3]

The second FOIA request was filed on December 28 and 29, 1976, by the Military Audit Project (MAP) after Kissinger publicly announced the gift of his telephone notes to the United States and their placement in the Library of Congress. The MAP request, filed with the Department of State, sought records of all Kissinger's conversations made while Secretary of State and National Security Adviser. On January 18, 1977, the Legal Adviser of the Department of State denied the request on two grounds. First, he found that the notes were not agency records. Second, the deposit of the notes with the Library of Congress prior to the request terminated the Department's custody and control. The denial was affirmed on administrative appeal.

The third FOIA request was filed on January 13, 1977, by the Reporters Committee for Freedom of the Press (RCFP), the American Historical Association, the American Political Science Association, and a number of other journalists (collectively referred to as the RCFP requesters). This request also sought production of the telephone notes made by Kissinger both while he was National Security Adviser and

[3] Safire filed an administrative appeal from this decision, contending that the notes were agency records by virtue of their relocation to the State Department. The appeal was denied.

Secretary of State. The request was denied for the same reasons given to the MAP requesters.

The United States has taken some action to seek recovery of the notes for record processing. On January 4, 1977, the Government Archivist wrote to Kissinger, requesting that he be permitted to inspect the telephone notes so that he could determine whether they were Department records, and to determine whether Kissinger had authority to remove them from Department custody. The State Department Legal Adviser, however, analyzed the Archivist's request and issued a memorandum concluding that so long as extracts of the official business contained in the notes were filed as agency records, Kissinger had complied with the Department's regulations. The Legal Adviser also concluded that the inspection procedures suggested by the Archivist would compromise the Department's policy of respecting the privacy of such secretarial notes and would discourage the creation of historical materials in the first instance. On January 18, 1977, Kissinger replied to the Archivist, declining to permit access.

The Archivist renewed his request for an inspection on February 11, 1977, by which time Kissinger was no longer Secretary of State. With the request, he enclosed a memorandum of law prepared by the General Counsel of the GSA concluding that the materials in question might well be records rather than personal files and that the Archivist was entitled to inspect them under the Federal Records and Records Disposal Acts, 44 U. S. C. §§ 2901–2909, 3101–3107; 44 U. S. C. §§ 3301–3314 (1976 ed. and Supp. II). Kissinger did not respond to the Archivist's second request.

## C

Proceedings in the United States District Court for the District of Columbia commenced February 8, 1977. The RCFP requesters and Safire instituted an action under the FOIA, seeking enforcement of their FOIA requests. On March 8, 1977, MAP filed a similar suit. Both suits named

Kissinger, the Library of Congress, the Secretary of State and the Department of State as defendants. The plaintiffs sought a judgment declaring that the summaries were agency records that had been unlawfully removed and were being improperly withheld. Plaintiffs requested as ultimate relief that the court require the Library to return the transcripts to the Department with directions to process them for disclosure under the FOIA.

Cross-motions for summary judgment were filed by all plaintiffs and by Kissinger. The District Judge ruled in plaintiffs' favor as to transcripts produced while Kissinger was Secretary of State, but denied relief as to transcripts of conversations produced while Kissinger was Special Assistant to the President. The court first found that the transcripts of telephone conversations were "agency records" subject to disclosure under the FOIA. The court also found that Kissinger had wrongfully removed these records by not obtaining the prior approval of the Administrator of General Services. The court recognized that the FOIA did not directly provide for relief since the records were in the custody of the Library of Congress, which is not an "agency" under the Act. Nevertheless, the court held that the FOIA permitted the court to invoke its equitable powers "to order the return of wrongfully removed agency documents where a statutory retrieval action appears unlikely."

An order was entered requiring the Library to return the documents to the Department of State; requiring the Department of State to determine which of the summaries are exempt from disclosure under the FOIA, and to provide the required materials to the plaintiffs. The court denied the production of summaries made during Kissinger's tenure as National Security Adviser on the basis of a mistaken assumption that plaintiffs had withdrawn their request for these summaries.

Both Kissinger and the private parties appealed from the lower court judgment. The Court of Appeals, without dis-

cussion, affirmed the trial court judgment ordering production of the summaries made while Kissinger was Secretary of State. The Court of Appeals also held that the summaries made during Kissinger's service as National Security Adviser need not be produced. The court found that this request had not been withdrawn, and reasoned that three considerations supported nonproduction: (1) the FOIA does not cover those Presidential advisers "who are so close to him as to be within the White House"; (2) the relocation of the transcripts to the State Department did not bring them within its disclosure responsibilities under the FOIA; and (3) the fact that portions of the transcripts may reflect the affairs of the NSC, an agency to which the FOIA *does* apply, provided no basis for disclosure in the absence of an FOIA request directed to that agency.

Kissinger filed a petition for certiorari requesting this Court to review the Court of Appeals' determination that the State Department had improperly withheld agency records, thereby permitting their production from the Library of Congress. The RCFP requesters filed a cross-petition seeking review of that court's judgment denying production of the conversations transcribed while Kissinger served as National Security Adviser. We granted both petitions, 441 U. S. 904, and we now affirm in part and reverse in part.

## II

We first address the issue presented by Kissinger—whether the District Court possessed the authority to order the transfer of that portion of the deeded collection, including the transcripts of all conversations Kissinger made while Secretary of State, from the Library of Congress to the Department of State at the behest of the named plaintiffs. The lower courts premised this exercise of jurisdiction on their findings that the papers were "agency records" and that they had been wrongfully removed from State Department custody in viola-

tion of the Federal Records Disposal Act, 44 U. S. C. § 3303. We need not, and do not, decide whether the telephone notes are agency records, or were wrongfully removed, for even assuming an affirmative answer to each of these questions, the FOIA plaintiffs were not entitled to relief.

The question must be, of course, whether Congress has conferred jurisdiction on the federal courts to impose this remedy. Two statutory schemes are relevant to this inquiry. First, if Congress contemplated a private right of action under the Federal Records Act and the Federal Records Disposal Act, this would in itself justify the remedy imposed if Kissinger in fact wrongfully removed the documents. In the alternative, the lower court order could be sustained if authorized by the FOIA.

A

The Federal Records Act of 1950, 44 U. S. C. § 2901 *et seq.*, authorizes the "head of each Federal agency" to establish a "records management program" and to define the extent to which documents are "appropriate for preservation" as agency records. The records management program requires that adequate documentation of agency policies and procedures be retained. The Records Disposal Act, a complementary records management Act, provides the exclusive means for record disposal. 44 U. S. C. § 3314.

Under the Records Disposal Act, once a document achieves the status of a "record" as defined by the Act, it may not be alienated or disposed of without the consent of the Administrator of General Services, who has delegated his authority in such matters to the Archivist of the United States. 44 U. S. C. §§ 3303, 3303a, 3308–3314 (1976 ed. and Supp. II); GSA, Delegations of Authority Manual, ADM P. 5450.39A. Thus if Kissinger's telephone notes were "records" within the meaning of the Federal Records Act, a question we do not reach, then Kissinger's transfer might well violate the Act since he did not seek the approval of the Archivist prior to

transferring custody to himself and then to the Library of Congress. We assume such a wrongful removal *arguendo* for the purposes of this opinion.

But the Federal Records Act establishes only one remedy for the improper removal of a "record" from the agency. The head of the agency is required under 44 U. S. C. § 3106 to notify the Attorney General if he determines or "has reason to believe" that records have been improperly removed from the agency. The Administrator of General Services is obligated to assist in such actions. 44 U. S. C. § 2905. At the behest of these administrators, the Attorney General may bring suit to recover the records.

The Archivist did request return of the telephone notes from Kissinger on the basis of his belief that the documents may have been wrongfully removed under the Act. Despite Kissinger's refusal to comply with the Archivist's request, no suit has been instituted against Kissinger to retrieve the records under 44 U. S. C. § 3106.

Plaintiff requesters effectively seek to enforce these requirements of the Acts by seeking the return of the records to State Department custody. No provision of either Act, however, expressly confers a right of action on private parties. Nor do we believe that such a private right of action can be implied.

This Court has spent too many pages identifying the factors relevant to uncovering congressional intent to imply a private cause of action to belabor the topic here.[4] Our most recent pronouncement on the subject, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979), readily disposes of the question. First, the language of the Records Acts merely "proscribes certain conduct" and does not "create or alter any civil liabilities." *Id.*, at 19. The Records Act also expressly provides administrative remedies for violations of the duties

[4] See *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979); *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979).

it imposes, implicating our conclusion in *Transamerica Mortgage* that it is "an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Ibid.* Finally, the legislative history does not detract from the inference to be drawn from congressional silence, but rather confirms that such silence is purposeful.

The legislative history of the Acts reveals that their purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole. The Senate Report to the Federal Records Act of 1950 reveals this focus. S. Rep. No. 2140, 81st Cong., 2d Sess., 4 (1950). The Report states:

> "It is well to emphasize that records come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them. There is danger of this simple, self-evident fact being lost for lack of emphasis. The measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization. . . . [The] first interest is in the establishment of a useful system of documentation that will enable [the executive] to have the information he needs available when he needs it."

Congress expressly recognized the need for devising adequate statutory safeguards against the unauthorized removal of agency records, and opted in favor of a system of administrative standards and enforcement. See U. S. Commission on Organization of the Executive Branch of the Government, Task Force Report on Records Management 27 (1949). Thus, regardless of whether Kissinger has violated the Records and Records Disposal Acts, Congress has not vested fed-

eral courts with jurisdiction to adjudicate that question upon suit by a private party. That responsibility is vested in the administrative authorities.[5]

B

The plaintiff requesters contend that even though the Federal Records and Records Disposal Acts do not contemplate a private right of action, the FOIA nevertheless supplies what was missing from those Acts—congressional intent to permit private actions to recover records wrongfully removed from Government custody. We are, however, unable to read the FOIA as supplying that congressional intent.

The FOIA represents a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment. That statutory scheme authorizes federal courts to ensure private access to requested materials when three requirements have been met. Under 5 U. S. C. § 552 (a)(4)(B) federal jurisdiction is dependent upon a showing that an agency has (1) "improperly"; (2) "withheld"; (3) "agency records." Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation. We find it unnecessary to decide whether the telephone notes were "agency records" since we conclude that a covered agency—here the State Department—has not "withheld" those documents from the plaintiffs. We also need not decide the full contours of a prohibited "withholding." We do decide, however, that Congress did not mean that an agency improperly withholds a document which has been removed from the possession of the agency prior to the filing of the FOIA request. In such a case, the agency has neither

[5] We need not decide what remedies might be available to private plaintiffs complaining that the administrators and the Attorney General have breached a duty to enforce the Records Act, since no such action was brought here. See 5 U. S. C. §§ 704, 701 (a)(2), 706 (1).

the custody nor control necessary to enable it to withhold.

In looking for congressional intent, we quite naturally start with the usual meaning of the word "withhold" itself. The requesters would have us read the "hold" out of "withhold." The act described by this word presupposes the actor's possession or control of the item withheld. A refusal to resort to legal remedies to obtain possession is simply not conduct subsumed by the verb "withhold."

The Act and its legislative history do not purport to define the word. An examination of the structure and purposes of the Act, however, indicates that Congress used the word in its usual sense. An agency's failure to sue a third party to obtain possession is not a withholding under the Act.

Several sources suggest directly that agency possession or control is prerequisite to triggering any duties under the FOIA. In the debates, the Act was described as ensuring "access to the information *possessed* by [Government] servants." (Emphasis added.) 112 Cong. Rec. 13652 (1966), reprinted in Freedom of Information Act Source Book, S. Doc. No. 93–82, p. 69 (1974) (remarks of Rep. Monagan) (hereinafter Source Book I).

Following FOIA's enactment in 1966, the Attorney General issued guidelines for the use of all federal departments and agencies in complying with the new statute. The guidelines state that FOIA

> "refers, of course, only to records in being and in the possession or control of an agency. . . . [It] imposes no obligation to compile or *procure* a record in response to a request." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23–24 (June 1967), Source Book I, pp. 222–223.

Most courts which have considered the question have concluded that the FOIA is only directed at requiring agencies to disclose those "agency records" for which they have chosen

to retain possession or control.[6] See also *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 221 (1978), describing the Act as reaching "records and material in the possession of federal agencies. . . ."

The conclusion that possession or control is a prerequisite to FOIA disclosure duties is reinforced by an examination of the purposes of the Act. The Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.[7] It has been settled by decision of this Court that only the Federal Records Act, and not the FOIA, requires an agency to actually create records, even though the agency's failure to do so deprives the public of information which might have otherwise been available to it. *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 161–162 (1975); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U. S. 168, 192 (1975).

If the agency is not required to create or to retain records under the FOIA, it is somewhat difficult to determine why the agency is nevertheless required to retrieve documents which have escaped its possession, but which it has not endeavored to recover. If the document is of so little interest to the agency that it does not believe the retrieval effort to be justified, the effect of this judgment on an FOIA request seems little different from the effect of an agency determina-

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[6] See *Nolen* v. *Rumsfeld*, 535 F. 2d 890, 891 (CA5 1976) (suit "seeking production of missing records . . . is not within the purview of the Freedom of Information Act"), cert. denied, 429 U. S. 1104 (1977); *Nichols* v. *United States*, 325 F. Supp. 130, 137 (Kan. 1971) ("the Court may not require production of records not in [the] custody or control of an agency"), aff'd, 460 F. 2d 671 (CA10), cert. denied, 409 U. S. 966 (1972); *Ciba-Geigy Corp.* v. *Mathews*, 428 F. Supp. 523, 531 (SDNY 1977) ("[T]he government cannot be compelled to obtain possession of documents not under its control or furnish an opinion when none is written").

[7] Congress has imposed some very limited record-creating obligations with regard to indexing under the FOIA. See 5 U. S. C. § 552 (a)(2).

tion that a record should never be created, or should be discarded.[8]

The procedural provisions of the Act, in particular, reflect the nature of the obligation which Congress intended to impose on agencies in the production of agency records. First, Congress has provided that agencies normally must decide within 10 days whether to comply with an FOIA request unless they can establish "unusual circumstances" as defined in the Act. 5 U. S. C. §§ 552 (a)(6)(A), (B). The "unusual circumstances" specified by the Act include "the need to search for and collect the requested records from field facilities and other establishments that are separate from the office processing the request." This exception for searching and collecting certainly does not suggest that Congress expected an agency to commence lawsuits in order to obtain possession of documents requested, particularly when it is seen that where an extension is allowable, the period of the extension is only for 10 days. Either Congress was operating under the assumption that lawsuits could be waged and won in 10 days, or it was operating under the assumption that agencies would not be obligated to file lawsuits in order to comply with FOIA requests.

A similarly strong expression of congressional expectations emerges in 5 U. S. C. § 552 (a)(4)(A) providing for recovery of certain costs incurred in complying with FOIA requests. This section was included in the Act in order to reduce the burdens imposed on the agencies. The agency is authorized to establish fees for the "direct costs" of "document search and duplication." The costs allowed reflect the congressional judgment as to the nature of the costs which would be incurred. Congress identified these costs, and thus the agency burdens, as consisting of "search" and "duplication." During

[8] This is not to suggest that this discretionary determination by the agency relieves it of other obligations imposed by the records management Acts. The observation goes only to the nature of the public right of access provided by the FOIA.

the enactment of the 1974 amendments to the FOIA, it was emphasized that agencies generally are not obligated to provide extensive services in fulfilling FOIA requests. S. Rep. No. 93–854, p. 12 (1974), reprinted in House Committee on Government Operations and Senate Committee on the Judiciary, Freedom of Information Act and Amendments of 1974: Source Book, 94th Cong., 1st Sess., 164 (Joint Comm. Print 1975) (hereinafter Source Book II). When agencies do provide additional services in conducting a search, they are clearly authorized to allocate that cost to the requester. *Ibid.* It is doubtful that Congress intended that a "search" include legal efforts to retrieve wrongfully removed documents, since such an intent would authorize agency assessment to the private requester of its litigation costs in such an endeavor.

It is therefore clear that Congress never intended, when it enacted the FOIA, to displace the statutory scheme embodied in the Federal Records Act and the Federal Records Disposal Act providing for administrative remedies to safeguard against wrongful removal of agency records as well as to retrieve wrongfully removed records. This result is buttressed by our decisions in *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1 (1974), and *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*, both demonstrating reluctance to construe the FOIA as silently departing from prior longstanding practice. *Bannercraft*, *supra*, of course held that Congress intended federal district courts to retain traditional equitable jurisdiction in adjudicating FOIA actions. But historic equitable practice has long recognized that an individual does not improperly withhold a document sought pursuant to a subpoena by his refusal to sue a third party to obtain or recover possession. *Amey* v. *Long*, 9 East 473, 482, 103 Eng. Rep. 653, 657 (K. B. 1808).

C

This construction of "withholding" readily disposes of the RCFP and MAP requests. Both of these requests were filed after Kissinger's telephone notes had been deeded to the Li-

brary of Congress.[9] The Government, through the Archivist, has requested return of the documents from Kissinger. The request has been refused. The facts make it apparent that Kissinger, and the Library of Congress as his donee, are holding the documents under a claim of right. Under these circumstances, the State Department cannot be said to have had possession or control of the documents at the time the requests were received. It did not, therefore, withhold any agency records, an indispensable prerequisite to liability in a suit under the FOIA.

## III

The Safire request raises a separate question. At the time when Safire submitted his request for certain notes of Kissinger's telephone conversations, all the notes were still located in Kissinger's office at the State Department. For this reason, we do not rest our resolution of his claim on the grounds that there was no withholding by the State Department. As outlined above, the Act only prohibits the withholding of "agency records." We conclude that the Safire request sought disclosure of documents which were not "agency records" within the meaning of the FOIA.

Safire's request sought only a limited category of documents. He requested the Department to produce all transcripts of telephone conversations made by Kissinger from his White House office between January 21, 1969, and Febru-

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[9] There is no question that a "withholding" must here be gauged by the time at which the request is made since there is no FOIA obligation to retain records prior to that request. This temporal factor has always governed requests under the subpoena power, *Jurney* v. *MacCracken*, 294 U. S. 125 (1935), as well as under other access statutes. See Fed. Rules Civ. Proc. 34, 45. We need not decide whether this standard might be displaced in the event that it was shown that an agency official purposefully routed a document out of agency possession in order to circumvent a FOIA request. No such issue is presented here. We also express no opinion as to whether an agency withholds documents which have been wrongfully removed by an individual after a request is filed.

ary 12, 1971, in which (1) Safire's name appeared; or (2) in which Kissinger discussed the subject of information "leaks" with General Alexander Haig, Attorney General John Mitchell, President Richard Nixon, J. Edgar Hoover, or any other official of the FBI.

The FOIA does render the "Executive Office of the President" an agency subject to the Act. 5 U. S. C. § 552 (e). The legislative history is unambiguous, however, in explaining that the "Executive Office" does not include the Office of the President. The Conference Report for the 1974 FOIA Amendments indicates that "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President" are not included within the term "agency" under the FOIA. H. R. Conf. Rep. No. 93–1380, p. 15 (1974), reprinted in Source Book II, p. 232. Safire's request was limited to a period of time in which Kissinger was serving as Assistant to the President. Thus these telephone notes were not "agency records" when they were made.

The RCFP requesters have argued that since some of the telephone notes made while Kissinger was adviser to the President may have related to the National Security Council they may have been National Security Council records and therefore subject to the Act. See H. R. Rep No. 93–876, p. 8 (1974), Source Book II, p. 128, indicating that the National Security Council is an executive agency to which the FOIA applies. We need not decide when records which, in the words of the RCFP requesters, merely "relate to" the affairs of an FOIA agency become records of that agency. To the extent Safire sought discussions concerning information leaks which threatened the internal secrecy of White House policy-making, he sought conversations in which Kissinger had acted in his capacity as a Presidential adviser, only.

Nor does his request for conversations in which his name appeared require a different conclusion. Safire never identi-

fied the request as implicating any National Security Council records. The request did not mention the National Security Council or any subject relating to the NSC. To the contrary, he requested to see transcripts Kissinger made from his White House office. Moreover, after the State Department denied the request on the grounds that these were White House records, Safire's appeal argued these were State Department records, again never suggesting they were NSC records. The FOIA requires the requester to adequately identify the records which are sought. 5 U. S. C. § 552 (a)(3)(A). Safire's request did not describe the records as relating to the NSC or in any way put the agency on notice that it should refer the request to the NSC. See 5 U. S. C. § 552 (a)(6)(B)(iii). Therefore, we also need not address the issue of when an agency violates the Act by refusing to produce records of another agency, or failing to refer a request to the appropriate agency.

The RCFP requesters nevertheless contend that if the transcripts of telephone conversations made while adviser to the President were not then "agency records," they acquired that status under the Act when they were removed from White House files and physically taken to Kissinger's office at the Department of State. We simply decline to hold that the physical location of the notes of telephone conversations renders them "agency records." The papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department's files, and they were not used by the Department for any purpose. If mere physical location of papers and materials could confer status as an "agency record" Kissinger's personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA. It requires little discussion or analysis to conclude that the lower courts correctly resolved this question in favor of Kissinger. See also *Forsham* v. *Harris, post,* p. 169.

Accordingly, we reverse the order of the Court of Appeals compelling production of the telephone manuscripts made by Kissinger while Secretary of State and affirm the order denying the requests for transcripts produced while Kissinger served as National Security Adviser.

*It is so ordered.*

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE BLACKMUN took no part in the decision of these cases.

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

Today's decision explores hitherto uncharted territory in a complicated statutory scheme. I cannot agree with what is to me the Court's crabbed interpretation of "improper withholding" under the Freedom of Information Act (FOIA). At the same time, I am not without some uncertainty about the contours of the "improper withholding" standard. Accordingly, although the result reached by my Brother STEVENS strikes me as the most workable for the present, I write separately to articulate some ideas on this difficult problem.

As an abstract matter, I concur in the Court's view that FOIA's reach should not be conditioned upon the legality of a documents transfer under the Federal Records and Records Disposal Acts. 44 U. S. C. § 2901 *et seq.*; 44 U. S. C. § 3301 *et seq.* (1976 ed. and Supp. II). These Acts establish a fairly comprehensive scheme for internal records management, one element of which is an administrative process for regulating and enforcing records disposal standards. Thus, the "legality" of a document transfer for purposes of the Records Acts is, in a practical sense, partly a matter of administrative discretion. Conceptually, it seems strange to import such a discretionary factor into the legal standards that govern

*private* rights of action under FOIA. And it is not surprising that the Records Acts and FOIA fail to mesh: The former scheme is evidently directed toward fostering administrative interests, while the latter is definitely designed to serve the needs of the general public. Consequently, the Records Acts either may fail to promote the interests embodied in FOIA, or may address concerns that are irrelevant to FOIA.[1]

Although I agree that the Records Acts cannot be neatly interpolated into FOIA, I part company with the Court when it concludes that FOIA does not reach records that have been removed from a federal agency's custody. If FOIA is to be more than a dead letter, it must necessarily incorporate some restraint upon the agency's powers to move documents beyond the reach of the FOIA requester. Even the Court's opinion implies—as I think it must—that an agency would be improperly withholding documents if it failed to take steps to recover papers removed from its custody deliberately to evade an FOIA request. *Ante*, at 155, n. 9. Beyond that minimal rule, I would think it also plainly unacceptable for an agency to devise a records routing system aimed at frustrating FOIA requests in general by moving documents outside agency custody with unseemly haste.

Indeed, I would go further. If the purpose of FOIA is to provide public access to the records incorporated into Government decisionmaking, see *Forsham* v. *Harris*, *post*, at 188 (BRENNAN, J., dissenting), then agencies may well have a concomitant responsibility to retain possession of, or control over, those records.[2] But, as with so many questions that

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[1] For example, a document transfer may comport with the formal requirements of the Records Acts, and yet be motivated by the desire to avoid a pending FOIA request.

[2] This notion is not incompatible with *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 161–162 (1975), and *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U. S. 168, 192 (1975), which held that FOIA does not compel agencies to write opinions where not otherwise required. FOIA neither compels the Government to conduct research

the Court must resolve, the difficulty is where to draw the line. We could hardly assume that Congress intended agencies to be prevented from surrendering all documents that might be of interest to requesters—so broad a rule would not only swamp the agencies with paper, but would also seem incompatible with the records management goals of the Records Acts. See S. Rep. No. 2140, 81st Cong., 2d Sess., 4 (1950). Perhaps the appropriate test would take into account the importance of specific records; it might also consider the length of time records would be held, and the historical frequency of requests for documents of a particular type. To suggest the elements of such a test, however, is to expose how ill-suited a court is to define them adequately. It is Congress which has the resources and responsibility to fashion a rule about document retention that comports with the objectives of FOIA.

Although one might hope that Congress will soon address this problem, we must decide the case currently before us. I have little difficulty concluding that records which should have been retained for FOIA purposes may be reached under FOIA even though they have already passed beyond the agency's control.[3] In the absence of an analytically satisfying standard for determining *which* records should be retained, however, it is necessary to resolve this case by looking to an approach that is currently practicable. My Brother STEVENS'

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on behalf of private citizens, nor duplicates administrative law requirements of adequate explanation for Government action, see *id.*, at 191–192. What the Act does mandate is exposure of the research and explanations which the Government has chosen to memorialize; an agency's obligation to *retain* records, therefore, may be inferred from FOIA without contradicting the principle that agencies need not *create* records.

[3] This will not necessarily entail the agency's litigating against the third party in possession of the documents, as the Court suggests. Rather, the third party might be joined in the FOIA suit. Cf. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 19–20 (1974).

position fairly fits this prescription. While turning an FOIA suit upon the Records Acts is, as I have recognized, conceptually problematic, the records statutes do formulate document retention criteria that are not unduly burdensome and that carry a congressional imprimatur.

Accordingly, I agree with MR. JUSTICE STEVENS' conclusion with respect to the "improper withholding" issue, and therefore dissent from Part II of the Court's opinion.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

As the Court recognizes, the requesters are entitled to prevail in this FOIA action if the State Department "has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Ante*, at 150. The Court assumes, without deciding, that "agency records" have been requested and then concludes that no such records have been "withheld." The Court states, and I agree, that an agency cannot "withhold" documents unless it has either custody or control of them. It then goes on, however, to equate "custody" and "control" with physical possession, holding that FOIA is simply inapplicable to any "document which has been removed from the possession of the agency prior to the filing of the FOIA request." *Ibid.*[1]

I cannot agree that this conclusion is compelled by the plain language of the statute; moreover, it seems to me wholly inconsistent with the congressional purpose underlying the Freedom of Information Act. The decision today exempts documents that have been wrongfully removed from the agency's files from any scrutiny whatsoever under FOIA. It thus creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future FOIA requests. It is the creation

[1] The Court states that "[i]n such a case, the agency has neither the custody nor control necessary to enable it to withhold." *Ante*, at 150–151.

of such an incentive, which is directly contrary to the purpose of FOIA, rather than the result in this particular case,[2] that prompts me to write in dissent.

In my judgment, a "withholding" occurs within the meaning of FOIA whenever an agency declines to produce agency records which it has a legal right to possess or control. A determination that documents have been withheld does not end the inquiry, of course, for a court must still determine whether the withholding was "improper" for purposes of the Act. Thus, in my view, correct analysis requires us to confront three separate questions in the following order: (1) are any of the requested documents "agency records"? (2) if so, have any of them been withheld because they are in the *legal* custody of the agency? and (3) if so, was the withholding improper?

## I

Everyone seems to agree that the summaries of Dr. Kissinger's State Department telephone conversations[3] should be considered "agency records" subject to disclosure under FOIA if they were "agency records" under the definitions set forth in the Federal Records Act (FRA). The parties disagree,

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[2] I do not mean to imply that there was any improper motive for Dr. Kissinger's removal of the documents in this case. Nor do I believe that the decision the Court reaches today will necessarily lessen the requesters' access to the information contained in the summaries of Dr. Kissinger's telephone conversations. Many, if not all, of the significant decisions reflected in those summaries are also reflected in other agency records, which are still in the State Department's possession. Also, it is not clear how many of the summaries, even if subject to FOIA, would be exempt from production because they contain either classified or purely personal information. See 5 U. S. C. §§ 552 (b)(1) and (b)(6).

[3] I agree with Part III of the Court's opinion that the summaries of Dr. Kissinger's telephone conversations when he was a Presidential adviser were not "agency records" subject to disclosure under FOIA when they were created and did not become "agency records" when they were later stored in Dr. Kissinger's files at the State Department.

however, as to the proper application of that Act to the facts of this case. The requesters argue that the summaries were "records" under the FRA because they were documents "appropriate for preservation" by the agency under 44 U. S. C. § 3301. Dr. Kissinger, on the other hand, argues that the summaries were personal papers which he could dispose of at will under the FRA and which were never subject to disclosure under FOIA. The Government takes an intermediate position, arguing that the summaries were "agency records" only to the extent that they contained significant information that was not reflected in other agency records.[4]

I cannot accept Dr. Kissinger's argument that the summaries are private papers. As the District Court noted, they were made in the regular course of conducting the agency's business, were the work product of agency personnel and agency assets, and were maintained in the possession and control of the agency prior to their removal by Dr. Kissinger.

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[4] The Government argues that Dr. Kissinger had an obligation under the State Department's records management program to record permanently all oral "[d]ecisions, commitments, and discussions of any significance." 5 FAM § 423.2–1 (1974). Thus, he should have extracted all significant information pertaining to agency business from his telephone summaries and entered that information in the agency's permanent records. To the extent that he did not do so, the telephone summaries remain the sole written evidence of that information and thus should be considered "agency records." However, to the extent that Dr. Kissinger saw to it that the information was properly recorded elsewhere, the Government argues that the summaries became "non-record materials" which could be disposed of with the agency's permission. (The Government concedes that some nonrecord materials may be subject to disclosure under FOIA while in the agency's possession; it takes the position, however, that such materials are not subject to either the FOIA or the FRA after they have been relinquished.)

Because it believes that the degree of duplication between the summaries and records still in the agency's possession cannot be determined from the evidence presented in this case, the Government argues that a remand would be appropriate if the issue of whether the summaries were "agency records" must be decided.

They were also regularly circulated to Dr. Kissinger's immediate staff and presumably used by the staff in making day-to-day decisions on behalf of the agency. Finally, Dr. Kissinger himself recognized that the State Department continued to have an interest in the summaries even after they had been removed, since he had a State Department employee review them in order to extract information that was not otherwise in the agency's files. App. 248a. Under these circumstances, I find it difficult to believe that none of the summaries was "appropriate for preservation" by the agency. Thus, although a remand might be necessary, as the Government suggests, see n. 4, *supra*, to determine which summaries were agency records and which were not, it is clear that at least some of them fell within that category at the time Dr. Kissinger removed them from his files at the State Department.[5]

## II

The second question to be considered is whether the State Department continued to have custody or control of the telephone summaries after they were removed from its files so that its refusal to take steps to regain them should be deemed a "withholding" within the meaning of the Freedom of Information Act. As I stated at the outset, I do not agree with the Court that the broad concepts of "custody" and "control" can be equated with the much narrower concept of physical possession.[6] In my view, those concepts should be applied to

[5] The fact that extracts were not made until *after* the summaries had been transferred to the Library of Congress indicates that, even under the Government's view, some of the summaries must have been "agency records" at the time they were removed from the State Department. Moreover, during the course of the litigation Dr. Kissinger granted permission to the Archivist and the State Department to review the summaries in order to determine whether they should seek their return as "agency records" despite the existence of the summaries. Brief for Federal Parties 14, n. 11.

[6] The Court's reference to subpoenas is instructive. See *ante*, at 154. Under Rule 34 of the Federal Rules of Civil Procedure, a party is required

bring all documents within the *legal* custody or control of the agency within the purview of FOIA. Thus, if an agency has a legal right to regain possession of documents wrongfully removed from its files, it continues to have custody of those documents. If it then refuses to take any steps whatsoever to demand, or even to request, that the documents be returned, then the agency is "withholding" those documents for purposes of FOIA.

In this case, I think it is rather clear that the telephone summaries were wrongfully removed from the State Department's possession.[7] Under these circumstances, the State

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to produce requested documents if they are within his "possession, custody or control." The same standard applies to subpoenas *duces tecum* issued under Rule 45, see 9 C. Wright & A. Miller, Federal Practice and Procedure § 2454, p. 425 (1971). In construing these Rules the courts have rejected a narrow physical-possession test, focusing instead on whether the subpoenaed party has a legal right to custody or control of the documents in question. See, *e. g.*, *United States* v. *International Business Machines Corp.*, 71 F. R. D. 88, 91 (SDNY 1976); *Buckley* v. *Vidal*, 50 F. R. D. 271, 274 (SDNY 1970); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2210 (1970). Thus, if this case involved compliance with a discovery request rather than an FOIA request, I doubt very much that the agency could justify its failure to produce the documents on the ground that the agency head had wrongfully removed them from the agency's physical possession just before the subpoena was served.

[7] Once Dr. Kissinger's argument that the summaries were private papers is rejected, it becomes clear that the Federal Records Act and Records Disposal Act were violated by the transfer of the papers to the Library of Congress. If the summaries were agency records, as the requesters argue, then the State Department could not properly relinquish them without obtaining the approval of the General Services Administration. Under the Records Disposal Act GSA's approval would be conditioned on a showing that the documents were no longer needed in the "transaction of its current business" and did not have "sufficient administrative, legal, research, or other value to warrant their further preservation by the Government." 44 U. S. C. §§ 3303, 3303a (1976 ed. and Supp. II).

If, on the other hand, the summaries could have been converted from "records" to "non-record materials" as the Government suggests, the State Department still would have been required to take steps prior to

Department's failure even to request their return [8] constituted a "withholding" for purposes of FOIA.

## III

The third and most difficult question is whether the State Department's "withholding" was "improper." In my view, the answer to that question depends on the agency's explanation for its failure to attempt to regain the documents. If the explanation is reasonable, then the withholding is not improper. For example, I would not find an agency's inaction improper in a case in which it simply did not know where the documents were located or had no interest whatsoever in retrieving them. The FOIA does not require federal agencies to engage in prolonged searches for documents or institute legal proceedings that will not yield any appreciable benefits to the agency.

On the other hand, if the agency is unable to advance a reasonable explanation for its failure to act, a presumption arises that the agency is motivated by a desire to shield the documents from FOIA scrutiny.[9] Thus, if the agency be-

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relinquishing them to assure itself that all significant information had been properly extracted for inclusion in more formal State Department files. The fact that such steps were not taken until *after* the summaries had been deeded over to the Library of Congress makes their removal from the agency by Dr. Kissinger unlawful even under the Government's theory.

[8] The Archivist did make several requests for the documents. App. 99a–116a. The fact that Dr. Kissinger refused those requests, however, does not demonstrate that a similar request by the State Department would also have been refused.

[9] The Court recognizes that there might be situations where documents were removed from the agency in order to avoid FOIA requests and suggests that its strict "physical-possession" standard might be "displaced" under these circumstances, *ante*, at 155, n. 9. As a practical matter, however, the Court's suggestion provides little comfort to the intended beneficiaries of the Act. For, if an agency can make a sufficient response to a request by simply denying physical possession, it will be a rare case indeed

lieved or had reason to believe that it had a legal right to the documents and that the documents were still valuable for its own internal purposes and nevertheless did not attempt to regain them, its inaction should be deemed an improper withholding.

In this case the State Department refused the FOIA requests on the ground that the telephone summaries were not agency records and, in any event, were no longer within the agency's custody or control. By the time the FOIA actions were filed, there was substantial reason for doubting the Department's resolution of the first issue, inasmuch as the General Counsel of GSA had rendered a legal opinion that the documents were probably agency records and should be returned to the Government for proper archival screening.[10] Because of their very nature, there was also substantial reason for believing that, if they were agency records, the summaries would have to be considered valuable documents. Finally, the fact that the documents had been removed by the head of the agency shortly before the expiration of his term of office raised an inference that the removal had been motivated by a desire to avoid FOIA disclosure.

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in which the ordinary citizen can overcome that denial by proof of improper motivation. Moreover, it would be unseemly to invite litigation and discovery into the subjective motivation of agency officials responsible for processing the flood of paper that threatens to engulf today's bureaucracy. Focusing attention on the agency's reason for not reacquiring the documents, rather than on the individual employee's motive for removing them in the first place, seems to me to be a preferable way of eliminating the incentive to transfer documents to avoid disclosure under FOIA.

[10] GSA, and in particular the Archivist, has supervisory responsibility over the various agencies' records management and disposal programs. See, *e. g.*, 44 U. S. C. §§ 2904, 2906, 3102, 3302, and 3303a (1976 ed. and Supp. II). Thus, an opinion by GSA's General Counsel could be expected to give a more authoritative and impartial view of the technical issue of what constitutes an agency record than an opinion by the State Department's legal counsel, given after the documents had already been removed.

Under these circumstances, it is at least arguable that the continued inaction of the State Department, contrary to the views of the Archivist, was improper.

Accordingly, I believe the District Court had jurisdiction under FOIA to determine (a) whether the telephone summaries were in fact agency records and (b) if so, whether the State Department's failure to seek return of the documents was improper. The court's disposition of those issues seems to me to have been somewhat premature, however. Once the litigation began, the State Department changed its position and contended that it could not determine whether it should seek return of the summaries without first inspecting them. Pursuant to an agreement with Dr. Kissinger, the Department and the Archivist began the process of sifting through the records. That process had not yet been completed when the District Court handed down its decision. Because the agency's informed opinion of the documents' status and their value was in my view relevant to a determination of whether its actions were "improper," I think the court's order was premature. I would therefore remand to give the Government an opportunity to finish its examination of the documents.

Syllabus

# FORSHAM ET AL. *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1118. Argued October 31, 1979—Decided March 3, 1980

Under federal grants awarded by the National Institute of Arthritis, Metabolism, and Digestive Diseases (NIAMDD) (a federal agency), the University Group Diabetes Program (UGDP), a group of private physicians and scientists, conducted a long-term study of the effectiveness of certain diabetes treatment regimens. Pertinent federal regulations authorized some supervision of UGDP and gave NIAMDD the right of access to, or permanent custody of, the raw data generated by UGDP. However, the day-to-day administration of grant-supported activities was in UGDP's hands, and NIAMDD did not exercise its right to review or obtain custody of the raw data, which remained at all times in UGDP's possession and under its ownership. The UGDP's reports on the results of its study, indicating that the use of certain drugs in diabetes treatment increased the risk of heart disease, ultimately resulted in proceedings by the Secretary of Health, Education, and Welfare (HEW) and the Food and Drug Administration (FDA) to restrict the labeling and use of the drugs. After both UGDP and HEW denied petitioners' request for access to the UGDP raw data underlying its published reports, petitioners filed suit in Federal District Court to require HEW to make the raw data available under the Freedom of Information Act (FOIA), which empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access. The District Court granted summary judgment for respondents, holding that HEW properly denied the request on the ground that the data did not constitute "agency records" under the FOIA. The Court of Appeals affirmed.

*Held:* HEW need not produce the requested data because they are not "agency records" within the meaning of the FOIA. Data generated by a privately controlled organization which has received federal grants (grantee), but which data has not at any time been obtained by the agency, are not "agency records" accessible under the FOIA. Pp. 177–187.

(a) There is no merit to petitioners' claim that the data were at least records of UGDP, and that the federal funding and supervision of UGDP alone provide the close connection necessary to render its

records "agency records" as that term is used in the FOIA. While "agency record" is not defined in the Act, Congress excluded private grantees from FOIA disclosure obligations by excluding them from the Act's definition of "agency," an action consistent with its prevalent practice of preserving the autonomy of federal grantees and their records. Since Congress found that federal funding and supervision (short of Government control) did not justify direct access to the grantee's records, it cannot be concluded that those identical activities were intended to permit indirect access through an expansive definition of "agency records." Pp. 178–182.

(b) Nor may a broad definition of "agency records" be invoked so as to include all documents created by a private grantee to which the Government has access and which the Government has used. Such a broad definition is not supported by either the language, structure, or legislative history of the FOIA. Instead, Congress contemplated that an agency must first either create or obtain a record as a prerequisite to its becoming an "agency record" within the meaning of the FOIA. This conclusion is also supported by other Acts in which Congress has associated creation or acquisition with the concept of a governmental record. Although in this case HEW has a right of access to the data, and a right if it so chooses to obtain permanent custody of the UGDP records, in this context the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained. Without first establishing that the agency has created or obtained the document, the agency's reliance on or use of the document is similarly irrelevant. Pp. 182–186.

190 U. S. App. D. C. 231, 587 F. 2d 1128, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 187.

*Michael R. Sonnenreich* argued the cause for petitioners. With him on the brief were *Neil L. Chayet, Harvey W. Freishtat,* and *Michael X. Morrell.*

*Deputy Solicitor General Geller* argued the cause for the federal respondents. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Daniel, William Alsup, Richard M. Cooper,* and *Michael P. Peskoe. Thomas E. Plank,* Assistant Attorney General of Maryland,

argued the cause for respondent Klimt. With him on the brief were *Stephen H. Sachs,* Attorney General, and *David H. Feldman,* Assistant Attorney General.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act, 5 U. S. C. § 552, empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access. § 552 (a)(4)(B). We hold here that written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not "agency records" within the meaning of the Act when copies of those data have not been obtained by a federal agency subject to the FOIA. Federal participation in the generation of the data by means of a grant from the Department of Health, Education, and Welfare (HEW) does not make the private organization a federal "agency" within the terms of the Act. Nor does this federal funding in combination with a federal right of access render the data "agency records" of HEW, which *is* a federal "agency" under the terms of the Act.

## I

In 1959, a group of private physicians and scientists specializing in the treatment of diabetes formed the University Group Diabetes Program (UGDP). The UGDP conducted a long-term study of the effectiveness of five diabetes treatment regimens. Two of these treatment regimens involved diet control in combination with the administration of either tolbutamide, or phenformin hydrochloride, both "oral hypoglycemic" drugs. The UGDP's participating physicians were located at 12 clinics nationwide and the study was coordinated at the Coordinating Center of the University of Maryland.

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**Sheldon Elliot Steinbach* and *Joseph Anthony Keyes, Jr.,* filed a brief for the American Council on Education et al. as *amici curiae.*

The study generated more than 55 million records documenting the treatment of over 1,000 diabetic patients who were monitored for a 5- to 8-year period. In 1970, the UGDP presented the initial results of its study indicating that the treatment of adult-onset diabetics with tolbutamide increased the risk of death from cardiovascular disease over that present when diabetes was treated by the other methods studied. The UGDP later expanded these findings to report a similarly increased incidence of heart disease when patients were treated with phenformin hydrochloride. These findings have in turn generated substantial professional debate.

The Committee on the Care of the Diabetic (CCD), a national association of physicians involved in the treatment of diabetes mellitus patients, have been among those critical of the UGDP study. CCD requested the UGDP to grant it access to the raw data in order to facilitate its review of the UGDP findings, but UGDP has declined to comply with that request. CCD therefore sought to obtain the information under the Freedom of Information Act. The essential facts are not in dispute, and we hereafter set forth those relevant to our decision.

The UGDP study has been solely funded by federal grants in the neighborhood of $15 million between 1961 and 1978. These grants were awarded UGDP by the National Institute of Arthritis, Metabolism, and Digestive Diseases (NIAMDD), a federal agency,[1] pursuant to the Public Health Service Act, 42 U. S. C. § 241 (c). NIAMDD has not only awarded the federal grants to UGDP, but has exercised a certain amount

[1] The NIAMDD is one of several Institutes of the National Institutes of Health (NIH). It is authorized by statute to conduct and fund research on diabetes and other diseases. 42 U. S. C. §§ 289a, 289c–1. The NIH are a component of the federal Public Health Service, which is itself a part of the Department of Health, Education, and Welfare. See Reorg. Plan No. 3 of 1966, 3 CFR 1023 (1966–1970 Comp.), note following 42 U. S. C. § 202, and Reorganization Order of April 1, 1968, 33 Fed. Reg. 5426.

of supervision over the funded activity. Federal regulations governing supervision of grantees allow for the review of periodic reports submitted by the grantee and on-site visits, and require agency approval of major program or budgetary changes. 45 CFR §§ 74.80–74.85 (1979); 42 CFR § 52.20 (b) (1979). It is undisputed, however, both that the day-to-day administration of grant-supported activities is in the hands of a grantee, and that NIAMDD's supervision of UGDP conformed to these regulations.[2]

The grantee has also retained control of its records: the patient records and raw data generated by UGDP have at all times remained in the possession of that entity, and neither the NIAMDD grants nor related regulations shift ownership of such data to the Federal Government. NIAMDD does, however, have a right of access to the data in order to insure compliance with the grant. 45 CFR § 74.24 (a) (1979). And the Government may obtain permanent custody of the documents upon request. § 74.21 (c). But NIAMDD has not exercised its right either to review or to obtain permanent custody of the data.

Although no employees of the NIAMDD have reviewed the UGDP records, the Institute did contract in 1972 with another private grantee, the Biometric Society, for an assessment of the validity of the UGDP study. The Biometric Society was given direct access to the UGDP raw data by the terms of its contract with NIAMDD. The contract with the Biometric Society, however, did not require the Society to seek access to the UGDP raw data, nor did it require that any data actually reviewed be transmitted to the NIAMDD. While the Society did review some UGDP data, it did not submit any raw data reviewed by it to the NIAMDD. The Society

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[2] Petitioners do contend that the federal supervision of the UGDP study was substantial and more extensive than that ordinarily exercised. They do not, however, maintain that there was day-to-day supervision. See *infra*, at 180, and n. 11.

issued a report to the Institute in 1974 concluding that the UGDP results were "mixed" but "moderately strong."

An additional connection between the Federal Government and the UGDP study has occurred through the activities of the Food and Drug Administration. After the FDA was apprised of the UGDP results, the agency issued a statement recommending that physicians use tolbutamide in the treatment of diabetes only in limited circumstances. After the UGDP reported finding a similarly higher incidence of cardiovascular disease with the administration of phenformin, the FDA proposed changes in the labeling of these oral hypoglycemic drugs to warn patients of cardiovascular hazards. FDA Drug Bulletin (June 23, 1971). The FDA deferred further action on this labeling proposal, however, until the Biometric Society completed its review of the UGDP study.[3]

After the Biometric study was issued, FDA renewed its proposal to require a label warning that oral hypoglycemics should be used only in cases of adult-onset, stable diabetes that could not be treated adequately by a combination of diet and insulin. The FDA clearly relied on the UGDP study in renewing this position. 40 Fed. Reg. 28587, 28591 (1975). At the time the proposal was published, the FDA invited public comment. In response to criticism of the UGDP study and the Biometric Society's audit, the FDA conducted its own audit of the UGDP study pursuant to a delegation of NIAMDD's authority to audit grantee records. In conducting this audit, the FDA examined and copied a small sample of the UGDP raw data. This audit report has been made available for public inspection. 43 Fed. Reg. 52733 (1978).

Although this labeling proposal has not yet become final, other FDA regulatory action has been taken. On July 25,

[3] Prior to the FDA's decision to defer action, petitioners in this case sued the FDA to enjoin the proposed labeling, contesting the validity of the UGDP study. The First Circuit remanded the case to the FDA for exhaustion of administrative remedies. *Bradley* v. *Weinberger*, 483 F. 2d 410 (1973).

1977, the Secretary of HEW suspended the New Drug Application for phenformin, one of the oral hypoglycemic medications studied by the UGDP. The decision was premised in part on the findings of the UGDP study. See Order of the Secretary of Health, Education, and Welfare, July 25, 1977. After the Secretary's temporary order of suspension was issued, proceedings before the FDA continued. The Administrative Law Judge ordered the FDA to produce all UGDP data in its possession. The FDA then produced those portions of the UGDP raw data which the agency had copied, abstracted, or directly transferred to Government premises during its audit. The ALJ found that the HEW suspension order was supported by the evidence. On November 15, 1978, the Commissioner of Food and Drugs affirmed the ALJ's finding that phenformin was not shown to be safe and ordered it withdrawn from the market. 44 Fed. Reg. 20967 (1979). This decision was not based substantially on the UGDP study.[4]

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[4] The order of the Commissioner discounts reliance on the UGDP study. The order states that the ALJ was correct in concluding that from "an evidentiary standpoint" the "lack of availability of underlying data casts considerable doubt on the reliability of the UGDP conclusions." 44 Fed. Reg. 20969 (1979). The ALJ did permit reference to the UGDP study as a basis for expert opinion. The Commissioner concluded that this use of the study was permissible since the data underlying expert opinions need not always be admitted to substantiate the opinions. Nearly 400 published articles were included in the record of the phenformin proceeding and none of the articles was accompanied by the raw data on which they were based. The Commissioner noted that the ALJ referenced the UGDP study in only one paragraph of his eight-page summary.

The Commissioner concluded that the agency was not required to submit the UGDP data since it had not relied upon that data, but only upon the actual study. 21 CFR § 12.85 (1979). Nevertheless, the Commissioner stated that he "reviewed the testimony of the Bureau of Drug's expert witnesses and [found] that their reliance upon the UGDP study was not substantial and cannot reasonably be characterized as pivotal to the opinions expressed by those witnesses." 44 Fed. Reg. 20969 (1979).

Petitioners had long since initiated a series of FOIA requests seeking access to the UGDP raw data. On August 7, 1975, HEW denied their request for the UGDP data on the grounds that no branch of HEW had ever reviewed or seen the raw data; that the FDA's proposed relabeling action relied on the UGDP published reports and not on an analysis of the underlying data; that the data were the property of the UGDP, a private group; and that the agencies were not required to acquire and produce those data under the FOIA.[5] The following month petitioners filed this FOIA suit in the United States District Court for the District of Columbia to require HEW to make available all of the raw data compiled by UGDP. The District Court granted summary judgment in favor of respondents, holding that HEW properly denied the request on the ground that the patient data did not constitute "agency records" under the FOIA.

The Court of Appeals affirmed on the same rationale. *Forsham* v. *Califano*, 190 U. S. App. D. C. 231, 587 F. 2d 1128 (1978). The court found that although NIAMDD is a federal agency, its grantees are not federal agencies. The court rejected the petitioners' argument that the UGDP's records were nevertheless also the federal agency's records. Although HEW has a right of access to the documents, the court reasoned that this right did not render the documents "agency records" since the FOIA only applies to records which have been "created or obtained . . . in the course of doing its work."[6] *Id.*, at 239, 587 F. 2d, at 1136. The dissenting

[5] The denial of this FOIA request preceded the FDA's audit of the UGDP data.

[6] The court opinion also suggested that a document is an "agency record" if the federal agency has a duty to obtain the record. 190 U. S. App. D. C., at 239, and n. 18, 587 F. 2d, at 1136, and n. 18 (Leventhal, J.). Judge MacKinnon concurred separately to reserve the question of whether or not records which an agency had a duty to obtain were recoverable under the FOIA. We side with Judge MacKinnon on the

judge concluded that the UGDP data were "agency records" under the FOIA since the Government had been "significantly involved" in the study through its funding, access to the raw data, and reliance on the study in its regulatory actions.

## II

As we hold in the companion case of *Kissinger* v. *Reporters Committee for Freedom of the Press, ante,* p. 136, it must be established that an "agency" has "improperly withheld agency records" for an individual to obtain access to documents through an FOIA action. We hold here that HEW need not produce the requested data because they are *not* "agency records" within the meaning of the FOIA. In so holding, we reject three separate but related claims of petitioners: (1) the data they seek are "agency records" because they were at least "records" of UGDP, and UGDP in turn received its funds from a federal agency and was subject to some supervision by the agency in its use of those funds; (2) the data they seek are "agency records" because HEW, concededly a federal agency, had sufficient authority under its grant agreement to have obtained the data had it chosen to do so; and (3) the data are "agency records" because they formed the basis for the published reports of UGDP, which in turn were relied upon by the FDA in the actions described above.[7]

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breadth of the principle necessary to the decision in this case. *Id.*, at 242, 587 F. 2d, at 1139.

[7] Petitioners maintain that the FDA has relied on all the raw data through reliance on the report and through reliance on information obtained pursuant to its audit of a sample of the data. The Court of Appeals found, however, that data reviewed by the FDA have been made available to petitioners. *Id.*, at 236, 587 F. 2d, at 1133. As we indicate *infra*, reliance on a document does not make it an agency record if it has not been created or obtained by a federal agency. Reliance or use may well be relevant, however, to the question of whether a record in the possession of an agency is an "agency record." See *Kissinger, ante,* at 157.

Congress undoubtedly sought to expand public rights of access to Government information when it enacted the Freedom of Information Act, but that expansion was a finite one. Congress limited access to "agency records," 5 U. S. C. § 552 (a)(4)(B),[8] but did not provide any definition of "agency records" in that Act. The use of the word "agency" as a modifier demonstrates that Congress contemplated some relationship between an "agency" and the "record" requested under the FOIA. With due regard for the policies and language of the FOIA, we conclude that data generated by a privately controlled organization which has received grant funds from an agency (hereafter grantee),[9] but which data has not at any time been obtained by the agency, are not "agency records" accessible under the FOIA.

A

We first examine petitioners' claim that the data were at least records of UGDP, and that the federal funding and supervision of UGDP alone provides the close connection necessary to render *its* records "agency records" as that term is used in the Freedom of Information Act. Congress did not define "agency record" under the FOIA, but it did define "agency." The definition of "agency" reveals a great deal about congressional intent as to the availability of records

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[8] In § 552 (a)(3) Congress did not use the term "agency records." That section provides: "[E]ach agency, upon any request for records . . . shall make the records promptly available to any person." Since the enforcement provision of the Act, § 552 (a)(4)(B), refers only to "agency records" it is certain that the disclosure obligations imposed by § 552 (a)(3) were only intended to extend to agency records. That limitation is implicit throughout the Act.

[9] We use the term "grantee" or "private grantee" to describe private recipients of federal funds not subjected to sufficient Government control to render them federal agencies. We do not suggest, by use of this term, that an organization receiving federal grant funds could never be found to be a federal agency. See *infra*, at 180, and n. 11.

from private grantees under the FOIA, and thus, a great deal about the relevance of federal funding and supervision to the definitional scope of "agency records." Congress excluded private grantees from FOIA disclosure obligations by excluding them from the definition of "agency," an action consistent with its prevalent practice of preserving grantee autonomy. It has, for example, disclaimed any federal property rights in grantee records by virtue of its funding. We cannot agree with petitioners in light of these circumstances that the very federal funding and supervision which Congress found insufficient to make the grantee an *agency* subject to the FOIA nevertheless makes its *records* accessible under the same Act.

Under 5 U. S. C. § 552 (e) an "agency" is defined as

> "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency."

The legislative history indicates unequivocally that private organizations receiving federal financial assistance grants are not within the definition of "agency." In their Report, the conferees stated that they did "not intend to include corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting." H. Conf. Rep. No. 93–1380, pp. 14–15 (1974), reprinted in Freedom of Information Act and Amendments of 1974 Source Book 231–232 (Jt. Comm. Print 1975). Through operation of this exclusion, Congress chose not to confer any direct public rights of access to such federally funded project information.[10]

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[10] Numerous bills seeking to extend the FOIA to federal grantees have been introduced in each Congress since the 92d, but none has yet been reported out of committee. See H. R. 11013, 92d Cong., 1st Sess. (1969); H. R. 1291, 93d Cong., 1st Sess. (1973); H. R. 1205, 94th Cong., 1st Sess. (1975); H. R. 3207, 95th Cong., 1st Sess. (1977); H. R. 1465, 96th Cong., 1st Sess. (1979).

This treatment of federal grantees under the FOIA is consistent with congressional treatment of them in other areas of federal law. Grants of federal funds generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision. *United States* v. *Orleans*, 425 U. S. 807, 818 (1976). Measured by these standards, the UGDP is not a federal instrumentality or an FOIA agency.[11]

Congress could have provided that the records generated by a federally funded grantee were federal property even though the grantee has not been adopted as a federal entity. But Congress has not done so, reflecting the same regard for the autonomy of the grantee's records as for the grantee itself. Congress expressly requires an agency to use "procurement contracts" when the "principal purpose of the instrument is the acquisition . . . of property or services for the direct benefit or use of the Federal Government. . . ." Federal Grant and Cooperative Agreement Act of 1977, § 4, 92 Stat. 4, 41 U. S. C. § 503 (1976 ed., Supp. II). In contrast, "grant agreements" must be used when money is given to a recipient "in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition . . . of property or services. . . ." § 5, 41 U. S. C. § 504 (1976 ed., Supp. II). As in this case, where a grant was used,

[11] Before characterizing an entity as "federal" for some purpose, this Court has required a threshold showing of substantial federal supervision of the private activities, and not just the exercise of regulatory authority necessary to assure compliance with the goals of the federal grant. See *United States* v. *Orleans*, 425 U. S. 807 (1976). While the petitioners emphasize the Government's interest in monitoring the UGDP's study, they do not contend that this supervision is sufficient to render UGDP a satellite federal agency. The funding and supervision indicated by the facts of this case are consistent with the usual grantor-grantee relationship and do not suggest the requisite magnitude of Government control. *Orleans*, *supra*, at 815–816.

there is no dispute that the documents created are the property of the recipient, and not the Federal Government. See 45 CFR § 74.133 (1979). The HEW regulations do retain a right to acquire the documents. Those regulations, however, clearly demonstrate that unless and until that right is exercised, the records are only the "records of grantees." 45 CFR § 74.24 (1979).[12] Therefore, were petitioners to prevail in this action, they would have obtained a right of access to some 55 million documents created, owned, and possessed by a private recipient of federal funds. While this fact itself is not dispositive of the outcome, it is nonetheless an important consideration when viewed in light of these congressional attempts to maintain the autonomy of federal grantees and their records.

The fact that Congress has chosen not to make a federal grantee an "agency" or to vest ownership of the records in the Government does not resolve with mathematical precision the question of whether the granting agency's funding and supervisory activities nevertheless make the grantee's records "agency records." Records of a nonagency certainly could become records of an agency as well. But if Congress found that federal funding and supervision did not justify direct access to the grantee's records, as it clearly did, we fail to see why we should nevertheless conclude that those identical activities were intended to permit indirect access through an expansive definition of "agency records." [13] Such a con-

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[12] The particular grant agreement in issue similarly confers on the NIAMDD a limited right of access to "records of the grantee."

[13] Nor could this distinction be explained by a hypothetical congressional preference for placing the burdens of production on the agency rather than the private grantee. Although under the petitioners' construction of the Act the request would have to be made by the agency, the administrative burdens of searching and producing, or providing access, would necessarily accrue substantially to the party in possession, *i. e.*, the private grantee.

clusion would not implement the intent of Congress; it would defeat it.

These considerations do not finally conclude the inquiry, for conceivably other facts might indicate that the documents could be "agency records" even though generated by a private grantee. The definition of "agency" and congressional policy towards grantee records indicate, however, that Congress did not intend that grant supervision short of Government control serve as a sufficient basis to make the private records "agency records" under the Act, and reveal a congressional determination to keep federal grantees free from the direct obligations imposed by the FOIA. In ascertaining the intended expanse of the term "agency records" then, we must, of course, construe the Act with regard both for the congressional purpose of increasing public access to governmental records and for this equally explicit purpose of retaining grantee autonomy.

B

Petitioners seek to prevail on their second and third theories, even though their first be rejected, by invoking a broad definition of "agency records," so as to include all documents created by a private grantee to which the Government has access, and which the Government has used. We do not believe that this broad definition of "agency records," a term undefined in the FOIA, is supported by either the language of that Act or its legislative history. We instead agree with the opinions of the courts below that Congress contemplated that an agency must first either create or obtain a record as a prerequisite to its becoming an "agency record" within the meaning of the FOIA. While it would be stretching the ordinary meaning of the words to call the data in question here "agency records," we need not rest our conclusions solely on the "plain language" rule of statutory construction. The use of the term "record" by Congress in two other Acts, and the structure

and legislative history of the FOIA alike support the same conclusion.

Although Congress has supplied no definition of agency records in the FOIA, it has formulated a definition in other Acts. The Records Disposal Act, in effect at the time Congress enacted the Freedom of Information Act, provides the following threshold requirement for agency records:

> " 'records' includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, *made or received* by an agency of the United States Government under Federal law or in connection with the transaction of public business. . . ." 44 U. S. C. § 3301.[14] (Emphasis added.)

The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23–24 (1967), S. Doc. No. 93–82, pp. 222–223 (1974), concludes that Congress intended this aspect of the Records Act definition to apply to the Freedom of Information Act.

The same standard emerges in the Presidential Records Act of 1978. The term "presidential records" is defined as "documentary materials . . . *created or received* by the President. . . ." 44 U. S. C. § 2201 (2) (1976 ed., Supp. II). (Emphasis added.) While these definitions are not disposi-

[14] The definition of "records" under the Records Disposal Act further requires that records made or received by the agency also be "preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." Government documents made or received by an agency that are not appropriate for preservation are referred to as "nonrecord materials." 41 CFR § 101–11.401–3 (d) (1979). It has not been settled whether the FOIA definition of agency records extends to "nonrecord materials." We need not reach that question since the documents sought by petitioners do not meet the threshold requirement that they be "made or received" by a federal agency.

tive of the proper interpretation of congressional use of the word in the FOIA, it is not insignificant that Congress has associated creation or acquisition with the concept of a governmental record. The text, structure, and legislative history of the FOIA itself reinforce that significance in this case.

The only direct reference to a definition of records in the legislative history, of which we are aware, occurred during the Senate hearings leading to the enactment of FOIA. A representative of the Interstate Commerce Commission commented that "[s]ince the word 'records' . . . is not defined, we assume that it includes all papers which an agency preserves in the performance of its functions." Administrative Procedure Act: Hearings on S. 1160 et al. before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 244 (1965).[15] The legislative history of the FOIA abounds with other references to records acquired by an agency. For example, the legislative Reports clarify that confidential information "submitted . . . to a Government . . . agency," "obtained by the Government," or "given to an agency" otherwise subject to disclosure, was made exempt. S. Rep. No. 813, 89th Cong., 1st Sess., 9 (1965), reprinted in Freedom of Information Act Source Book, S. Doc. No. 93–82, p. 44 (Comm. Print 1974); H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), reprinted in Source Book, at 31.

Section 552 (b)(4) provides the strongest structural support for this construction. This section exempts trade secrets and commercial or financial information "obtained from a person." This exemption was designed to protect confidential information "submitted" by a borrower to a lending agency or "obtained by the Government" through questionnaires or other inquiries, where such information "would customarily not be released to the public by the person from whom it was

[15] It is interesting to note that the witness expressed concern that such an "all-expansive meaning" necessitated clear categorical exemptions.

obtained." S. Rep. No. 813, *supra*, at 9; H. R. Rep. No. 1497, *supra*, at 10. It is significant that Congress did not include a similar exemption for confidential information contained in records which had never been "obtained from a person." It is obvious that this omission does not reflect a congressional judgment that records remaining in private control are not similarly deserving of this exemption, but rather a judgment that records which have never passed from private to agency control are *not* agency records which would require any such exemption. This possessory emphasis is buttressed by similar considerations implicit in the use of the word "withholding" in the statutory framework. See *Kissinger* v. *Reporters Committee for Freedom of the Press*, *ante*, p. 136.[16]

The same focus emerges in a congressional amendment to the Securities Exchange Act of 1934. That Act had provided its own standards for public access to documents generated by the Act. Congress amended the Act to provide:

> "For purposes of [the FOIA] the term 'records' includes all applications, statements, reports, contracts, correspondence, notices, and other documents *filed with* or otherwise *obtained* by the Commission pursuant to this chapter or otherwise." (Emphasis added.) 15 U. S. C. § 78x.

We think that the weight this construction lends to our conclusion is overborne neither by an agency's potential access to the grantee's information nor by its reliance on that information in carrying out the various duties entrusted to it by Congress. The Freedom of Information Act deals with "agency records," not information in the abstract. Petitioners place great reliance on the fact that HEW has a right of access to the data, and a right if it so chooses to obtain permanent custody of the UGDP records. 45 CFR §§ 74.24,

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[16] We certainly do not indicate, however, that physical possession, or initial creation, is by itself always sufficient. See *Kissinger*, *ante*, at 157.

74.21 (1979). But in this context the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained.[17] To construe the FOIA to embrace the latter class of documents would be to extend the reach of the Act beyond what we believe Congress intended. We rejected a similar argument in *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 161–162 (1975), by holding that the FOIA imposes no duty on the agency to create records. By ordering HEW to exercise its right of access, we effectively would be compelling the agency to "create" an agency record since prior to that exercise the record was not a record of the agency. Thus without first establishing that the agency has created or obtained the document, reliance or use is similarly irrelevant.

We think the foregoing reasons dispose of all petitioners' arguments. We therefore conclude that the data petitioners seek are not "agency records" within the meaning of the FOIA. UGDP is not a "federal agency" as that term is defined in the FOIA, and the data petitioners seek have not been created or obtained by a federal agency. Having failed to establish

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[17] We need not categorize what agency conduct is necessary to support a finding that it has "obtained" documents, since an unexercised right of access clearly does not satisfy this requirement. Government access to documents clearly could not be the central component of the definition of agency records contemplated by Congress since the Federal Government has access to near astronomical numbers of private documents. A mere sampling of access statutes includes: Internal Revenue Code of 1954, § 7602, 26 U. S. C. § 7602 (taxpayers or potential taxpayers); 15 U. S. C. §§ 78q, 78u (persons subject to the Securities Exchange Act of 1934); 29 U. S. C. § 657 (each employer subject to the Occupational Safety and Health Act of 1970).

Even if the Court were to accept petitioners' argument that only contractual access should give rise to "agency record" status, a limitation which does not appear readily supportable, the class of documents subject to FOIA disclosure would still be staggering. The record in this case indicates that NIAMDD alone has some 18,000 research grants outstanding.

this threshold requirement, petitioners' FOIA claim must fail, and the judgment of the Court of Appeals is accordingly

*Affirmed.*

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I agree with the Court that "[r]ecords of a nonagency certainly could become records of an agency as well." *Ante*, at 181. But the Court does not explain why such a conversion does not occur in this case.[1] Because I believe we should articulate standards under which to analyze such cases and because I believe that under a proper test UGDP's data should be treated as "agency records," I dissent.

I

The Court argues at length that UGDP is not an agency. But whether or not UGDP is an "agency" is simply not at issue in this case. Rather, the only question is whether data generated in the course of this UGDP study are "agency records."

The Court concedes, of course, that the statute itself does not define "agency records."[2] Therefore, our task is to con-

[1] The Court suggests that if a federal grant created a partnership or joint venture between the agency and the grantee, the grantee might become an agency and, thus, its records might become agency records. *Ante*, at 180. Likewise, the Court might reach a different result where the agency has chosen to buy data through a procurement contract instead of a grant. *Ibid.* But neither of these is an instance involving records of a nonagency. In the first the grantee becomes an agency, and in the second the records do not belong to the nonagency.

[2] Therefore, the Court surely overstates the fact in saying that Congress "clearly" found that federal funding and supervision are not relevant to whether direct access to grantee's records is justified, *ante*, at 181, and the Court does not explain why Congress' silence "reflect[s] the same regard for the autonomy of the grantee's records as for the grantee itself," *ante*, at 180. Moreover, nothing whatever is cited in the legislative history to support the Court's claim that the "purpose of retaining grantee autonomy"

strue the statutory language consistently with the purposes of FOIA.[3] As detailed in the dissenting opinion below, *Forsham* v. *Califano*, 190 U. S. App. D. C. 231, 244–245, 587 F. 2d 1128, 1141–1142 (1978) (Bazelon, J., dissenting), FOIA is a broad enactment meant to open the processes of Government to public inspection. It reflects a finding that if left to themselves agencies would operate in near secrecy.[4] FOIA was, therefore, enacted to provide access to information to enable "an informed electorate," so "vital to the proper operation of a democracy," to govern itself. S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). Nothing whatever in the legislative history suggests that Congress meant to allow agencies to insulate important steps in decisionmaking on the basis of the technical niceties of who "owns" crucial documents.

Where the nexus between the agency and the requested information is close, and where the importance of the information to public understanding of the decisions or the operation

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was "equally explicit" as a purpose of FOIA as was increasing public access to governmental records. *Ante*, at 182.

[3] I find the Court's references to other statutes unenlightening. The Records Disposal Act and Presidential Records Act of 1978 are properly limited to records created or received because the agencies or the Executive cannot physically dispose of what they do not possess. These Acts are aimed at monitoring the physical destruction of agency documents and settling claims of ownership of Presidential documents. The agencies and the Executive cannot destroy or take for private use what they have never possessed.

As for the "structural" argument drawn from 5 U. S. C. § 552 (b)(4), I cannot imagine that trade secrets or commercial information not submitted to the Government would have been created or used for governmental purposes or with governmental funds. In short, the Government would have no claim of any kind on the information if it had not been submitted.

[4] FOIA was enacted because agencies had turned the predecessor statute on its head, transforming a public information statute into a secrecy statute. H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), reprinted in Freedom of Information Act Source Book, S. Doc. No. 93–82, pp. 22, 25–27 (Comm. Print 1974).

of the agency is great, I believe the congressional purposes require us to hold that the information sought is an "agency record" within the meaning of FOIA.

Admittedly, this test does not establish a bright line, but the evaluation of a calculus of relevant factors is nothing new to the law.[5] The first such factor is the importance of the record to an understanding of Government activities. If, for instance, the significance of the record is limited to understanding the workings of the nonagency, the public has no FOIA-protected interest in access. The weight to be given this factor can be tested by examining the role accorded the material in agency writings and the extent to which the agency reached its conclusions in reliance upon the particular source.

Mere materiality of information, standing alone, of course, is not enough.[6] FOIA does not give the public any unrestricted right to examine all data relied on by an agency. Congress required that the information constitute an "agency record." Thus, another necessary factor is that there be a link between the agency and the record.[7] Nothing in FOIA or its history suggests, however, that the connection must amount to outright possession or creation. Instead, again drawing from the legislative purposes, I believe the link must be such that the agency has treated the record as if it were

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[5] The Court offers no manageable standards of any kind. No guidance is given to the decisionmaker as to how to determine at what point a relationship between an agency and another organization ripens into a "joint venture." And, of course, we are given no key to guide the determination of what nonagency records "become records of an agency as well." *Ante*, at 181.

[6] The Court, by insisting on analyzing petitioners' contentions separately, never addresses the full, combined force of the arguments. It is only in combination that the various factors alluded to by petitioners tell the full story of governmental reliance on and involvement with the data and, thus, the importance to the success of Congress' FOIA scheme of disclosing this information.

[7] See Note, The Definition of "Agency Records" Under the Freedom of Information Act, 31 Stan. L. Rev. 1093, 1106–1114 (1979).

part of the regulatory process, as if it were in effect a record which exists to serve the regulatory process. Government by secrecy is no less destructive of democracy if it is carried on within agencies or within private organizations serving agencies. The value of the record to the electorate is not affected by whether the relationship between the agency and the private organization is governed formally by a procurement contract, a "joint venture" agreement, or a grant.[8] The existence of this factor can be tested by examining, *inter alia*, the degree to which the impetus for the creation of the record came from the agency or was developed independently, the degree to which the creation of the record was funded publicly or privately, the extent of governmental supervision of the creation of the record, and the extent of continuing governmental control over the record.

## II

On the facts of this case, I would conclude that UGDP's raw data are records of HEW. Both HEW and the FDA have taken significant actions in complete reliance on the UGDP study. The FDA has directly endorsed the study's conclusions and, in reliance thereon, sought mandatory labeling warnings on the drugs criticized by the UGDP. HEW cited the UGDP study as one of its basic sources when it suspended one of the drugs as an immediate hazard. The suggestion that these administrative actions relied solely on the published reports and not on the underlying raw data at issue here is unrealistic. The conclusions can be no stronger or weaker than the data on which they are based. One cannot even begin to evaluate an agency action without access to the raw data on which the conclusions were based, especially in a case such as this where the data are nonduplicable. The importance of the raw data in evaluating derivative conclusions was

[8] Certainly the agency cannot control the legal consequences simply by the label it attaches to a relationship.

recognized by the FDA when it employed another independent organization, the Biometric Society, to check UGDP's work. FDA secured access for the Society to the raw data, and the Society used a sample of the data.

This case is set against the background of an intense, often bitter,[9] battle being waged in the medical community over the validity of the UGDP study and the correct treatment regimen for diabetes. By endorsing the UGDP study the Federal Government has aligned itself on one side of the fight and has all but outlawed the regimen recommended by the other side. Petitioners in this case are medical scientists seeking to resolve questions that have been raised about the scientific and statistical methods underlying an agency's conclusions. This seems to me to be an archetypical instance of the need for public dissemination of the information.

Even so, I doubt that the information could be held to be an "agency record" had the Government not been so deeply involved in its creation. Petitioners have argued that the National Institutes of Health, in effect, did create these records. The agency not only completely funded the project's operation, but initiated the project and took responsibility for developing its research protocol as well. See *Forsham* v. *Califano*, 190 U. S. App. D. C., at 251, 587 F. 2d, at 1148 (Bazelon, J., voting for rehearing). They contend further that, beyond the normal level of NIH involvement in its grantees' studies set out by the Court, *ante*, at 173, the NIH exercised continuing supervision over this study through a "Policy Advisory Board" as a condition of the grant renewals.[10] *Forsham* v. *Califano*, *supra*. Finally, as the Court also

[9] One former UGDP investigator has challenged the scientific honesty of the research coordinator, who is also the current custodian of the raw data.

[10] Because the case comes to us on affirmance of the grant of respondents' motion for summary judgment, we must accept petitioners' version of any disputed facts. Thus, for instance, we are not free to de-emphasize the extent of federal supervision of the UGDP study alleged by petitioners.

acknowledges, there is no question that the Government has full access to the data under the terms of the grant and under federal regulations. Indeed, if it so chose, the Government could obtain permanent custody of the data merely by requesting it from UGDP. Thus, the data remain with the grantee only at the pleasure of the Government. In my view the record abundantly establishes that these data were developed with public funds and with Government assistance and, in large part, for governmental purposes. Therefore, I would hold that they are agency records, and I respectfully dissent.

## III

I emphasize that the standards I suggest do not mean opening to the public the files of all grantees or of all who submit information to the Government. In many cases grantees' records should not be treated as agency records. But the Court's approach must inevitably undermine FOIA's great purpose of exposing Government to the people. It is unavoidable that as the work of federal agencies mushrooms both in quantity and complexity the agencies must look to outside organizations to assist in governmental tasks. Just as the explosion of federal agencies, which are not directly responsible to the electorate, worked to hide the workings of the Federal Government from voters before enactment of FOIA, S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965), the understandable tendency of agencies to rely on nongovernmental grantees to perform myriad projects distances the electorate from important information by one more step. If the records of such organizations, when drawn directly into the regulatory process, are immune from public inspection, then government by secrecy must surely return.

# CROWN SIMPSON PULP CO. ET AL. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-797. Decided March 17, 1980

*Held:* The action of the Environmental Protection Agency (EPA) under the Federal Water Pollution Control Act in vetoing the issuance to petitioner pulpmill operators of National Pollutant Discharge Elimination System (NPDES) permits that were proposed by an agency of a State authorized by the EPA to issue such permits through its own program, and that granted petitioners' requests for variances from certain EPA effluent limitations and established alternative effluent limitations if the EPA disapproved the variances, is directly reviewable in the United States Court of Appeals under § 509 (b) (1) (F) of the Act, which provides for review in the courts of appeals of EPA actions "in issuing or denying" any NPDES permit. When the EPA, as here, objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to "deny" a permit within the meaning of § 509 (b) (1) (F).

Certiorari granted; 599 F. 2d 897, reversed and remanded.

PER CURIAM.

Pursuant to § 301 of the Federal Water Pollution Control Act (Act), as added by the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 844, and amended by the Clean Water Act of 1977, 91 Stat. 1582, 33 U. S. C. § 1311 (1976 ed. and Supp. II), the Environmental Protection Agency (EPA) [1] promulgates regulations limiting the amount of effluent that can be discharged into navigable waters from a category or class of point sources of pollution. Requirements for particular plants or mills are implemented through National Pollutant Discharge Elimination System (NPDES)

[1] We refer to the Administrator of EPA and to the Agency itself as EPA.

permits. EPA issues NPDES permits directly except in those States authorized by EPA to issue permits through their own programs. §§ 402 (b), 402 (c) of the Act, 33 U. S. C. §§ 1342 (b), 1342 (c) (1976 ed. and Supp. II). EPA is notified of the actions taken by state permit-issuing authorities and may veto the issuance of any permit by state authorities by objecting in writing within 90 days. § 402 (d)(2), 33 U. S. C. § 1342 (d)(2) (1976 ed., Supp. II). This case presents the question of whether the EPA's action denying a variance and disapproving effluent restrictions contained in a permit issued by an authorized state agency is directly reviewable in the United States Court of Appeals under § 509 (b) of the Act, 86 Stat. 892, 33 U. S. C. § 1369 (b).[2]

Petitioners operate bleached kraft pulpmills which discharge pollutants into the Pacific Ocean near Eureka, Cal. In 1976, they sought NPDES permits from the California Regional Water Resources Board, North Coast Region (Regional Board).[3] The Director of EPA's Region IX Enforcement Division objected to the permits proposed by the Regional Board. Petitioners sought direct review of the EPA's action in the Court of Appeals for the Ninth Circuit.

Those direct review proceedings were stayed pending action by the California State Water Resources Control Board (State Board). The State Board set aside the orders of the Regional Board and proposed to issue new permits in their stead. App. to Pet. for Cert. 54. It granted petitioners' re-

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[2] Section 402 was amended in 1977, after the permits in the present case were vetoed, to give EPA the power, which it did not then have, to issue its own permit if the State fails to meet EPA's objection within a specified time. § 402 (d)(4) of the Act, as added, 91 Stat. 1599, 33 U. S. C. § 1342 (d)(4) (1976 ed., Supp. II). We do not consider the impact, if any, of this amendment on the jurisdictional issue presented herein.

[3] The EPA has authorized the State of California to administer the NPDES program through the State Water Resources Control Board. The Regional Board exercises power delegated by the latter agency.

quests for variances from EPA's effluent limitations[4] for Biochemical Oxygen Demand (BOD) and pH, but established alternative effluent limitations for BOD and pH to apply in case EPA disapproved the variances in the proposed permits. EPA denied the requested variances and vetoed the permits to the extent that they exempted petitioners from full compliance with the BOD and pH effluent limitations. Petitioners brought a direct review action in the Ninth Circuit, which was consolidated with the actions which they had individually filed earlier.[5]

The Court of Appeals dismissed the petitions for lack of jurisdiction. 599 F. 2d 897 (1979). It concluded that it had no jurisdiction under § 509 (b)(1)(E) of the Act, 33 U. S. C. § 1369 (b)(1)(E), which provides for review in the courts of appeals of actions "approving or promulgating any effluent limitation or other limitation. . . ." The Court of Appeals found this subsection inapplicable since EPA did not approve or promulgate anything when it rejected a proposed permit. 599 F. 2d, at 902. Further, the court found that the subsection applied to effluent limitations affecting categories of point sources rather than to decisions affecting particular plants only. *Ibid.*

The court also found jurisdiction lacking under § 509 (b)(1)(F) of the Act, 33 U. S. C. § 1369 (b)(1)(F), which provides for review in the courts of appeals of EPA actions "in issuing or denying any permit under [§ 402 of the Act]. . . ."[6] The court recognized that in States where EPA itself admin-

[4] EPA's national effluent limitations for the bleached segment of the American paper industry were substantially upheld in *Weyerhaeuser Co.* v. *Costle*, 191 U. S. App. D. C. 309, 590 F. 2d 1011 (1978).

[5] The petitions challenging the actions of the Regional Board became moot once the State Board set aside the Regional Board's orders. The only live administrative decision under review at the time of the Court of Appeals' decision would appear to be that of the State Board.

[6] State-proposed NPDES permits are issued under authority of § 402 (b) of the Act, 33 U. S. C. § 1342 (b) (1976 ed. and Supp. II).

isters the permit program, this subsection unquestionably provides for direct review in the courts of appeals. 599 F. 2d, at 903. However, because California administers its own permit-issuing program, EPA in the present case did no more than veto an NPDES permit proposed by the state authority. The Court of Appeals found that under its decision in *Washington* v. *EPA*, 573 F. 2d 583 (1978) (*Scott Paper*), EPA's veto of a state-issued permit did not constitute "issuing or denying" a permit and therefore did not clothe the court with jurisdiction.

District Judge Renfrew, sitting by designation, concurred in the majority's analysis of § 509 (b)(1)(E), and also agreed that the § 509 (b)(1)(F) question was foreclosed by *Scott Paper*. 599 F. 2d, at 905. However, Judge Renfrew, believing that *Scott Paper* was wrongly decided, urged the Court of Appeals to take the present case en banc in order to consider overruling that decision. He argued that vesting jurisdiction in the courts of appeals under § 509 (b)(1)(F) would best comport with the congressional goal of ensuring prompt resolution of challenges to EPA's actions and would recognize that EPA's veto of a state-issued permit is functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program.

We agree with the concurring opinion and hold that the Court of Appeals had jurisdiction over this action under § 509 (b)(1)(F).[7] When EPA, as here, objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to "den[y]" a permit within the meaning of § 509 (b)(1)(F). Under the contrary construction of the Court of Appeals, denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State

[7] Because we find that the Court of Appeals had jurisdiction over this action under § 509 (b)(1)(F), we do not decide whether it might also have had jurisdiction under § 509 (b)(1)(E).

in which the case arose was or was not authorized to issue permits.[8] Moreover, the additional level of judicial review in those States with permit-issuing authority would likely cause delays in resolving disputes under the Act. Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system.[9] We therefore grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

*So ordered.*

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[8] Cf. *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112, 127–128, n. 18 (1977).

[9] Our holding is consistent with the approach taken by the Court of Appeals for the Sixth Circuit, *Republic Steel Corp.* v. *Costle*, 581 F. 2d 1228, 1230, n. 1 (1978), cert. denied, 440 U. S. 909 (1979); *Ford Motor Co.* v. *EPA*, 567 F. 2d 661, 668 (1977), and with dicta in the Second and Ninth Circuits, *Mianus River Preservation Comm.* v. *Administrator, EPA*, 541 F. 2d 899, 909 (CA2 1976); *Shell Oil Co.* v. *Train*, 585 F. 2d 408, 412 (CA9 1978). The Court of Appeals in the present case relied on decisions holding that the EPA's failure to object to a state-issued permit is not reviewable in the courts of appeals under § 509. *Save the Bay, Inc.* v. *Administrator, EPA*, 556 F. 2d 1282 (CA5 1977); *Mianus River Preservation Comm., supra*. However, those cases may be distinguishable because EPA's failure to object, as opposed to its affirmative veto of a state-issued permit, would not necessarily amount to "Administrator's action" within the meaning of § 509 (b)(1).

# COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* PACIFIC LEGAL FOUNDATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1472. Argued December 5, 1979—Decided March 18, 1980

Section 402 (a) (1) of the Federal Water Pollution Control Act (FWPCA) authorizes the Administrator of the Environmental Protection Agency (EPA), "after opportunity for public hearing," to issue a permit for the discharge of any pollutant upon condition that such discharge will meet all applicable requirements of the FWPCA or such conditions as the Administrator determines are necessary to carry out the Act's goals and objectives. Implementing regulations provide for public notice of the proposed issuance, denial, or modification of a permit; direct the EPA Regional Administrator to hold a public hearing on the proposed action if he finds a significant degree of public interest; and permit any interested person to request an "adjudicatory hearing" after the EPA's determination to take the proposed action. Such a request will be granted if it "[s]ets forth material issues of fact relevant to the questions of whether a permit should be issued, denied or modified." Respondent city of Los Angeles (city) owns a sewage treatment plant that is operated under permits issued by the EPA pursuant to the National Pollutant Discharge Elimination System (NPDES), established by the FWPCA. The city's current permit, as issued in 1975, conditioned continued discharges from the sewage treatment plant into the Pacific Ocean on the city's compliance with a schedule for achieving full secondary treatment of wastewater by October 1, 1979. In April 1977, the EPA advised the city that it proposed to extend the expiration date of the 1975 permit for a second time, to December 17, 1979, with all other terms and conditions of the permit to remain unchanged. Notice of the proposed action was published in the Los Angeles Times, but neither the city nor any other party, including respondent Pacific Legal Foundation, requested a hearing or filed comments on the proposed extension, and the EPA Regional Administrator determined that public interest in the modification proposal was insufficient to warrant a public hearing. After respondent Kilroy's postdetermination request for an adjudicatory hearing was denied on the ground that it did not set forth material

issues of fact relevant to the question whether the permit should be extended, respondents filed petitions with the Court of Appeals seeking review of the Regional Administrator's action. The Court of Appeals held that the EPA had failed to provide the "opportunity for public hearing" required by § 402 (a)(1) when it extended the federal permit, and remanded for a "proper hearing." In so holding, the court concluded that the EPA is required to justify every failure to hold a hearing on a permit action by proof that the material facts supporting the action "are not subject to dispute."

*Held:*

1. The Court of Appeals erred in concluding that the EPA is required to hold a public hearing on every NPDES permit action it takes unless it can show that the material facts supporting its action "are not subject to dispute." Rather, the implementing regulations in question are fully consistent with the FWPCA's purpose to provide the public with an "opportunity" for a hearing concerning agency actions respecting water pollution control, and are valid. Pp. 213–216.

2. Respondents have failed to demonstrate that the regulations in question were not applied properly in the context of this case. Pp. 216–220.

(a) Under the circumstances presented here, it was reasonable for the Regional Administrator to extend the permit's expiration date without further public hearing, on the grounds that the public had not exhibited a significant degree of interest in the proposed action, and that information pertinent to such a decision would not have been adduced if a hearing had been held. Pp. 216–218.

(b) The form of notice by newspaper publication was adequate. The city's argument that the notice was inadequate because its understanding of the compliance schedules was contrary to the EPA's was not pertinent to the agency's decision to extend the permit's expiration date. Pp. 218–219.

(c) The EPA did not err in failing to hold an adjudicatory hearing on the issues raised in respondent Kilroy's request because that request did not set forth material issues of fact pertinent to the question whether the permit's expiration date should be extended. Pp. 219–220.

586 F. 2d 650, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

*William Alsup* argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attor-*

*ney General Moorman, Deputy Solicitor General Claiborne, Angus Macbeth,* and *Raymond W. Mushal.*

*Robert K. Best* argued the cause for respondents. With him on the brief for respondents Pacific Legal Foundation et al. were *Ronald A. Zumbrun* and *Thomas E. Hookano. Burt Pines* and *Frederick N. Merkin* filed a brief for respondent City of Los Angeles.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case, in a sense, is a tale of a great city's—and the Nation's—basic problems in disposing of human waste. "How" and "where" are the ultimate questions, and they are intertwined. The issues presently before the Court, however, center in the administrative processes by which the city and the Nation seek to resolve those basic problems.

## I

Respondent city of Los Angeles owns and operates the Hyperion Wastewater Treatment Plant located in Playa Del Rey, Cal. Since 1960, the Hyperion plant has processed most of the city's sewage, and has discharged the wastes through three "outfalls" extending into the Pacific Ocean. The shortest outfall terminates about one mile from the coastline in 50 feet of water. It is operative only during emergencies caused by increased sewage flow during wet weather or by power failures at the pumping plant. The second outfall terminates about five miles out. Approximately 340 million gallons of treated wastewater are discharged every day into the ocean, at a depth of 187 feet, through that outfall. This wastewater receives at least "primary treatment," [1] but about

[1] Under applicable regulations, the Environmental Protection Agency defines "primary treatment" as "the first stage in wastewater treatment where substantially all floating or settleable solids, are removed by floatation and/or sedimentation." 40 CFR § 125.58 (m) (1979).

one-third of the flow also receives "secondary treatment" [2] by an activated sludge process. The third outfall terminates about seven miles from the coast. It is through this third outfall that the solids that have been removed during treatment are discharged into the ocean, at a depth of 300 feet. Prior to discharge the solid materials, commonly referred to as sludge, have been digested, screened, and diluted with secondary effluent. App. 3–4.

The Hyperion plant is operated under permits issued by the Environmental Protection Agency (EPA) and the California Regional Water Quality Control Board (CRWQCB). Such permits are issued pursuant to the National Pollutant Discharge Elimination System (NPDES), established by § 402 of the Federal Water Pollution Control Act (FWPCA), as added by the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 880, and as amended, 33 U. S. C. § 1342 (1976 ed. and Supp. II).[3] The FWPCA was enacted with a

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[2] The agency by its regulations describes "secondary treatment" as that treatment which will attain "the minimum level of effluent quality . . . in terms of . . . parameters [*sic*]." These so-called "parameters" (but compare any dictionary's definition of this term) are specified levels of biochemical oxygen demand, suspended solids, and pH values. 40 CFR §§ 125.58 (r) and 133.102 (1979).

[3] In March 1973, the EPA and the California State Water Resources Control Board entered into an understanding that gave the State primary responsibility for administering the NPDES program in California, with the EPA retaining jurisdiction over discharges beyond the limits of the territorial sea, that is, more than three miles out from the coastline. EPA permits are thus required for the Hyperion plant's discharges through the 5- and 7-mile outfalls. The CRWQCB, acting pursuant to California's Porter-Cologne Act, Cal. Water Code Ann. § 13260 *et seq.* (West 1971), also requires a state permit for these outfalls.

A general description of the original Federal Water Pollution Control Act passed in 1948, 62 Stat. 1155, the events that led to the 1972 Amendment, and the operation of the NPDES program, with particular emphasis on its implementation in California, is set forth in *EPA* v. *State Water Resources Control Board*, 426 U. S. 200, 202–209 (1976), and need not be repeated here.

stated and obviously worthy objective, that is, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101 (a), 86 Stat. 816, 33 U. S. C. § 1251 (a). In order to achieve that objective, Congress declared that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." § 101 (a)(1).

As one means of reaching that goal, Congress in § 301 (a) of the FWPCA provided: "Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U. S. C. §§ 1312, 1316, 1317, 1328, 1342, and 1344], the discharge of any pollutant by any person shall be unlawful." 86 Stat. 844, 33 U. S. C. § 1311 (a). Section 402 (a)(1) authorizes the Administrator of the EPA, "after opportunity for public hearing," to issue a permit for the discharge of any pollutant, notwithstanding § 301 (a), upon condition that such discharge will meet all applicable requirements established in other sections of the Act, or such conditions as the Administrator determines are necessary to carry out the Act's goals and objectives. 86 Stat. 880, 33 U. S. C. § 1342 (a)(1). One of the requirements applicable to an NPDES permit for a publicly owned treatment works, such as the Hyperion plant, is specified in § 301 (b)(1)(B). That provision requires such works in existence on July 1, 1977, to achieve "effluent limitations based upon secondary treatment as defined by the Administrator." [4] 86 Stat. 845, 33 U. S. C. § 1311 (b)(1)(B).

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[4] Although the EPA has taken the position in this litigation that § 301 (b)(1)(B) required the city to end the Hyperion plant's discharge of sludge into the ocean by July 1, 1977, the compliance schedule incorporated in the 1975 NPDES permit required the city to achieve total "sludge-out" by April 1978. The EPA asserts that this less stringent compliance schedule was necessitated by the practical inability of Los Angeles to meet the FWPCA's requirements. Reply Brief for Petitioner 8, n. 5. Congress subsequently has acted to permit the operator of a publicly owned treatment works, in certain circumstances, to request the

## II

The EPA has promulgated regulations providing for notice and public participation in any permit proceeding under the NPDES. Those regulations, implementing the statutory requirement that any NPDES permit be issued "after opportunity for public hearing," are the focus of this case. The regulations state: "Public notice of the proposed issuance, denial or modification of every permit or denial shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the proposed determination to issue, deny, or modify a permit for the discharge." 40 CFR § 125.32 (a) (1978).[5] That public notice "shall include at least": (1) circulation of the notice within the affected geographical area by posting in the post office and "public places" nearest the applicant's premises, or posting "near the entrance to the applicant's premises and in nearby places," or publication in local newspapers; (2) the mailing of notice to the permit applicant and "appropriate" federal and state authorities; and (3) the mailing of notice to any person or group who has requested placement on the NPDES permit mailing list for actions affecting the geographical area. *Ibid.*

Following the issuance of public notice the EPA Regional

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EPA Administrator to extend the time allowed for achieving the limitations of § 301 (b) (1) (B). Compliance must be attained, however, by July 1, 1983. Clean Water Act of 1977, Pub. L. 95-217, § 45, 91 Stat. 1584, 33 U. S. C. § 1311 (i) (1) (1976 ed., Supp. II). The city has applied for an extension of the July 1, 1977, secondary-treatment deadline established by § 301 (b) (1) (B), but that application has not yet been acted upon by the EPA. Brief for Respondent City of Los Angeles 6, n. 5.

[5] The EPA's public participation regulations were modified after the events central to this case took place. 44 Fed. Reg. 32854 (1979). Many features of the regulations that are at issue here, however, have been retained. See 40 CFR §§ 124.41–45, 124.61–64, 124.71–101, 124.111–127, and 124.131–135 (1979). All references in this opinion to the EPA's public participation regulations, unless otherwise designated, are to the 1978 compilation.

Administrator is directed to provide at least a 30-day period during which interested persons may submit written views concerning the proposed action or may request that a hearing be held. § 125.32 (b)(1). If the Regional Administrator "finds a significant degree of public interest in a proposed permit," he is directed to hold a public hearing on the proposed action at which interested parties may submit oral or written statements and data. § 125.34. Following a determination by the Regional Administrator to take a proposed permit action, he is directed to forward a copy of that determination to any person who has submitted written comments. If the determination is substantially changed from the initial proposed action, he must give public notice of that determination. In either event, his determination constitutes the final action of the EPA unless a timely request for an adjudicatory hearing is granted. § 125.35.

Any interested person, within 10 days following the date of the determination, may request an "adjudicatory hearing" or a "legal decision" with respect to the determination. § 125.36 (b). A request for an adjudicatory hearing is to be granted by the Regional Administrator if the request "[s]ets forth material issues of fact relevant to the questions of whether a permit should be issued, denied or modified." § 125.36 (c)(1)(ii). Issues of law, on the other hand, are not to be considered at an adjudicatory hearing. If a request for an adjudicatory hearing raises a legal issue, that issue is to be referred by the hearing officer to the EPA's Assistant Administrator for Enforcement and the General Counsel for resolution. If a request for an adjudicatory hearing raises only legal issues, a hearing will not be granted and the Regional Administrator will refer those issues to the aforementioned officers. § 125.36 (m).

## III

The EPA and the CRWQCB first issued a joint permit to the city of Los Angeles for discharges of treated sewage

from the Hyperion plant in November 1974. See App. 4. That permit, covering only the 1- and 5-mile outfalls, was issued following EPA publication of notice of its intent to issue a permit, an opportunity for the submission of written comments, and a public hearing. On August 18, 1975, the 1974 permit was rescinded by the federal and state authorities, and replaced with a permit covering all three outfalls. *Id.*, at 3. The 1975 permit conditioned continued discharges from the Hyperion plant on compliance by the city with a schedule designed to achieve full secondary treatment of wastewater by October 1, 1979, and the gradual elimination of the discharge of sludge into the ocean over a 30-month period following "concept approval" of a plan for alternative disposal of the sludge. *Id.*, at 17–19.[6]

In July 1976, the EPA notified Los Angeles that its 1975 NPDES permit would expire on February 1, 1977, and that a new permit would be needed if discharges were to continue beyond that date. Record 44. The city filed an application for a new permit on July 30. *Id.*, at 45–80. Thereafter, in September 1976, the CRWQCB suggested to the EPA that the city's current permit might be extended for six months to take into account any effect of pending federal legislation that would modify the FWPCA's mandatory compliance dates

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[6] On December 1, 1975, the CRWQCB issued an order modifying the city's compliance schedule for alternative sludge disposal. That order announced that "concept approval" had been given on October 1, 1975, and fixed definite dates for achieving the elimination of sludge discharge into the ocean. Total "sludge-out" was to be achieved by April 1, 1978. App. 51. In subsequent orders, the CRWQCB found that the city had failed to meet several deadlines for the submission of plans and specifications for various phases of the sludge discharge elimination project. The CRWQCB then modified the relevant compliance dates, and extended the deadline for total "sludge-out" to April 1, 1980. *Id.*, at 57. The city has taken the position in this litigation that the CRWQCB's extension of the deadline for total "sludge-out" has been incorporated within the compliance schedule of the Hyperion plant's federal permit as well. See *infra*, at 218–219.

for achievement of effluent limitations based upon secondary treatment. *Id.*, at 119. See n. 4, *supra*. On January 24, 1977, after a public hearing, the EPA and the CRWQCB did extend the expiration date of the 1975 permit from February 1 to June 30, 1977, citing inadequate time to review the city's application for a new permit. App. 93.[7]

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[7] In the meantime, a significant public controversy had developed concerning the EPA's approval of the city's alternative sludge disposal project. That project, to be funded by construction grants awarded under Title II of the FWPCA, 86 Stat. 833, 33 U. S. C. § 1281 *et seq.* (1976 ed. and Supp. II), has been referred to as the Hyperion Treatment Plant Interim Sludge Disposal Project. (The parties, commendably, have refrained from referring to this project as the HTPISDP, and so shall we.) The project called for the implementation of a process at the plant by which the digested sludge would be dewatered, formed into cakes, and hauled by truck to a sanitary landfill in Palos Verdes. An environmental impact appraisal developed by the EPA has estimated that when the trucking project is fully operational it will require 255 round trips per week over a distance of 42 miles. The city of Los Angeles and its Chamber of Commerce opposed the project, and objected when the EPA decided to fund it without preparing and evaluating an environmental impact statement (EIS), which they alleged to be required under the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.* App. 63. Respondent Pacific Legal Foundation (PLF) also objected. It requested the EPA to suspend those conditions on the city's NPDES permit that required it to cease ocean discharge of sewage sludge from the Hyperion plant. This request was based on PLF's interpretation of the requirements of the FWPCA with respect to the discharge of pollutants into the oceans. The PLF argued that § 403 of the FWPCA, 86 Stat. 883, 33 U. S. C. § 1343, required the EPA to perform a full environmental analysis of the effects on the ocean of the cessation of sludge discharge from the Hyperion plant, as well as the economic and social costs that would be involved in replacing ocean discharge with the landfill project. App. 84. The Regional Administrator of the EPA denied the PLF's request on January 31, 1977, taking the view that the FWPCA required all publicly owned treatment works to achieve effluent limitations based upon secondary treatment by July 1, 1977, and that this requirement mandated that the Hyperion plant cease the discharge of sewage sludge into the ocean. The Regional Administrator also noted that the conditions placed upon the 1975 permit had not been challenged during

On April 26, 1977, the EPA advised the city that it again proposed to extend the expiration date of its NPDES permit for the Hyperion plant, this time from June 30, 1977, to December 17, 1979.[8] All other terms and conditions of the

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the public hearings that preceded its issuance, and that no interested party had requested an adjudicatory hearing concerning those conditions. He therefore refused to reopen consideration of the 1975 permit. *Id.*, at 89. By the time of the Regional Administrator's response to the PLF, the city's permit already had been extended to June 30, 1977.

The PLF then attempted, unsuccessfully, to prevent the EPA from funding the Interim Sludge Disposal Project without preparing an EIS on its decision to do so. See *Pacific Legal Foundation* v. *Quarles*, 440 F. Supp. 316 (CD Cal. 1977), appeal docketed, No. 77-3844 (CA9). Subsequent to the District Court's decision in *Quarles*, however, the EPA voluntarily agreed to prepare an EIS on the project's funding. Brief for Petitioner 15, n. 12.

Still another PLF lawsuit relating to the Hyperion permit and its "sludge-out" schedule is pending. In that action the PLF has sued officials of the EPA and the Department of the Interior claiming that those agencies have failed to carry out their statutory obligations under the Endangered Species Act of 1973, 87 Stat. 884, 16 U. S. C. § 1531 *et seq.*, in approving the alternative sludge disposal project. The PLF contends that the elimination of sludge discharge into the ocean will adversely affect the food chain that supports the existence of gray whales and brown pelicans, and that trucks going to and from the landfill site will kill the El Segundo butterfly. Brief for Petitioner 15, n. 12. The District Court granted the PLF's motion for partial summary judgment on its contention that the agencies had not fulfilled their statutory obligation, and has required the EPA to consider, during the course of the hearing ordered by the Court of Appeals in this case, the effects of the permit's "sludge-out" schedule on endangered species. *Pacific Legal Foundation* v. *Andrus*, Civ. No. C-78-3464-AAH(SX) (CD Cal. May 8, 1979), appeals docketed, Nos. 79-3472, 79-3566, 79-3661 (CA9).

We, of course, express no view on the merits of these related PLF challenges to the Hyperion permit's compliance schedules.

[8] The Administrator of the EPA has the authority to issue NPDES permits "for fixed terms not exceeding five years." §§ 402 (a)(3), (b)(1)(B), 86 Stat. 880, 881, 33 U. S. C. §§ 1342 (a)(3), (b)(1)(B) (1976 ed. and Supp. II). The respondents have not challenged the substantive authority of the Administrator to extend the expiration of a per-

permit were to remain unchanged. App. 115–120. Notice of the proposed action was published in the Los Angeles Times the following day. See L. A. Times, Apr. 27, 1977, part V, p. 2, cols. 6–7. That notice described the permit and its proposed modification, and advised persons wishing to comment upon objections or to appear at a public hearing to submit their comments or requests for a hearing to the regional office of the EPA within 30 days. Neither the city nor the respondent PLF, nor any other party, requested a hearing or filed comments on the proposed extension, and the EPA's Regional Administrator determined that public interest in the modification proposal was insufficient to warrant convening a public hearing. On May 23, at a public hearing, the CRWQCB officially extended the expiration date of the state permit for the Hyperion plant until December 17, 1979. App. 154. On June 2, 1977, the Regional Administrator of the EPA transmitted to the city his final determination to extend the time of expiration of the federal permit to the same 1979 date. *Id.*, at 149.

On June 10, 1977, the PLF filed a Freedom of Information Act request with the regional enforcement division of the EPA, seeking information concerning the proposed extension of the expiration date of the Hyperion permit and, specifically, whether that extension had been approved. *Id.*, at 157. When informed by telephone on June 13 that the EPA's final determination had been made on June 2, and that a request for an adjudicatory hearing could be accepted only if filed that day, see 40 CFR § 125.36 (b)(1), respondent Kilroy, represented by PLF attorneys, filed such a request. Under EPA regulations, Kilroy's request for a hearing, if granted, would automatically stay the effectiveness of the permit modification pending disposition of the request. § 125.35 (d)(2).

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mit to a date within five years of its initial issuance, so long as such permit modification is implemented in accordance with applicable procedural requirements.

Respondent Kilroy's request for an adjudicatory hearing presented two issues that he wished to raise:

> "1. Whether the requirements of the permit should be modified in that the project that is the subject of the compliance schedule set forth in NPDES permit CA010991 [the Hyperion permit] is being evaluated in an EIS by the EPA pursuant to the requirements of NEPA, the compliance schedule should not be mandated in an NPDES permit until the NEPA study is completed; and
>
> "2. Whether the procedures used and the record developed were adequate [for the] issuance of an NPDES permit." App. 160.

Within 10 days of receiving Kilroy's request, the Regional Administrator responded by certified mail, stating his determination that the request did not set forth material issues of fact relevant to the question whether the permit should be extended. Thus, he concluded that Kilroy's request had not met the requirements of 40 CFR § 125.36 (c)(1)(ii). The Regional Administrator did construe the request, however, as one raising issues of law relating to the appropriate interpretation to be given regulations that had been promulgated under the FWPCA. He therefore certified to the EPA's General Counsel three issues of law raised by the request. App. 166.[9] Before the General Counsel's ruling

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[9] The following were the issues of law certified by the Regional Administrator to the General Counsel:

"1. Must EPA conduct an informal public hearing prior to taking action to extend the expiration date of an NPDES permit where public notice of the proposed action was published more than 30 days in advance of the action?

"2. Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date?

"3. May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule is being evaluated by EPA

on the certified issues of law was announced, respondents PLF and Kilroy, joined now by the city of Torrance, theretofore a stranger to the formal proceedings, filed a timely petition with the United States Court of Appeals for the Ninth Circuit seeking review of the Regional Administrator's action extending the expiration date of the Hyperion permit. A similar petition was filed by respondent city of Los Angeles. The petitions were consolidated for review. The Court of Appeals stayed the effect of the compliance schedules incorporated within the 1975 permit, pending final disposition of the consolidated cases. Even though the city's NPDES permit for the Hyperion plant, as modified by the EPA on June 2, 1977, stated that it expired December 17, 1979, the terms of the permit, other than those aspects of the compliance schedules requiring completion after January 1, 1977, have remained in effect, both through the Court of Appeals' stay and by operation of law.[10] The case, therefore, clearly has not become moot.

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in an Environmental Impact Statement for the purpose of determining whether a grant should be made to assist in the construction of the project?'" App. 168.

Following the parties' presentation of written briefs on these and related issues, the General Counsel ruled against respondent Kilroy. She concluded that the EPA has the authority to extend the expiration date of an NPDES permit through modification, and that an opportunity for a public hearing on such a modification must be provided. A hearing is to be held, however, only if the Regional Administrator finds a significant degree of public interest in the proposed modification. The General Counsel refrained from addressing the second certified issue because Kilroy's brief did not challenge specifically the adequacy of the record supporting the permit modification. Finally, she ruled that the EPA has the authority to extend the expiration date of a permit requiring the implementation of a project, even though funding for that project is undergoing evaluation in an EIS. The General Counsel relied on the District Court's decision in *Pacific Legal Foundation* v. *Quarles*, see n. 7, *supra*, as support for the latter ruling. App. 194.

[10] The Court of Appeals in December 1977 stayed the compliance schedules incorporated within the Hyperion plant's NPDES permit pend-

## IV

The Court of Appeals remanded the matter to the Administrator for the holding of a "proper hearing." 586 F. 2d 650, 660–661 (CA9 1978). After first determining that it had jurisdiction to hear respondents' petitions, and rejecting Los Angeles' argument that only the State of California had the authority to extend the Hyperion NPDES permit, *id.*, at 654–657, the court held that the EPA had failed to provide the "opportunity for public hearing" required by § 402 (a)(1) when it extended that permit. All parties agreed that the EPA had not in fact conducted a hearing prior to its extension of the permit on June 2, 1977. The EPA contended, however, that an *opportunity* for a hearing had been provided; it claimed that notice of the proposed extension had been published and that, when no one requested a hearing, it was proper under agency regulations for the Regional Administrator to conclude that there was insufficient public interest in the permit extension to necessitate a hearing. See 40 CFR § 125.34 (a). The Court of Appeals rejected the EPA's contention, holding:

> "The fact that no one requested a hearing prior to the decision is appropriately considered in this analysis, but it is not decisive. It must be shown that the material facts supporting the decision are not subject to dispute." 586 F. 2d, at 658–659 (footnotes omitted).

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ing proceedings on remand to the EPA. The effluent limitations that were in effect on January 1, 1977, however, as well as the permit's monitoring and reporting requirements, have remained operative pending final resolution of this dispute. 586 F. 2d 650, 660–661 (CA9 1978). Because the EPA has not yet acted upon the city's application, filed July 30, 1976, for a new NPDES permit, the terms and conditions of the 1975 permit have remained in effect by operation of law, even though the permit expiration date has now passed. See 5 U. S. C. § 558 (c) (a federal license with reference to an activity of a continuing nature does not expire until a timely application for renewal thereof has been finally determined by the pertinent agency); Tr. of Oral Arg. 4.

The court also relied on language in *Independent Bankers Assn.* v. *Board of Governors*, 170 U. S. App. D. C. 278, 516 F. 2d 1206 (1975), to the effect that certain "opportunity for hearing" requirements of the Bank Holding Company Act of 1956, as amended, 84 Stat. 1765, 12 U. S. C. § 1843 (c)(8), required the Board of Governors of the Federal Reserve System to hold an evidentiary hearing unless it could "show that the parties could gain nothing thereby, because they disputed none of the material facts upon which the agency's decision could rest." 170 U. S. App. D. C., at 292, 516 F. 2d, at 1220.

The Court of Appeals distinguished decisions of this Court in which it was held that a failure to request a hearing constituted a waiver of any right thereto under the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U. S. C. § 801 *et seq.*, and that an agency may place the burden of demonstrating that a case presents disputed issues of material fact on the party challenging the agency's action. 586 F. 2d, at 658–659, nn. 3 and 4 (discussing *National Coal Operators' Assn.* v. *Kleppe*, 423 U. S. 388, 397–398 (1976); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U. S. 609, 620 (1973); and *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 205 (1956)).

On the record before it, the Court of Appeals concluded that "the reasonableness of the EPA's compliance schedule [incorporated within the Hyperion NPDES permit] depends upon facts that may be disputed and with respect to which the record in this case is silent." 586 F. 2d, at 659. With respect to such factors as the adequacy of the Palos Verdes or other landfill site, the ability of the city to acquire the capacity to transport sludge to that site within designated time limits, and the possible effect on navigable waters of land disposal of the sludge, the court stated: "[W]e can conclude unequivocally neither that the parties have no dispute about these matters nor that they do." *Ibid.* Thus, the court found itself unable to deny respondents an adjudicatory hearing on the ground that there was no dispute concerning the

material facts upon which the EPA's decision to extend the permit had been based.

The Administrator of the EPA petitioned this Court for review of the question whether § 402 (a)(1) requires the EPA to conduct an adjudicatory hearing before taking action on an NPDES permit issuance or modification where, after notice of the proposed action, no one requested a hearing before the action was taken and the only request filed subsequently raised no material issue of fact.[11] We granted certiorari to review this important issue in a rapidly developing area of the law. 442 U. S. 928 (1979).

## V

### A

Petitioner's basic contentions are that the EPA was entitled to condition the availability of a public hearing on the extension of the Hyperion permit on the filing of a proper request, and that it similarly was entitled to condition an adjudicatory hearing following its extension decision on the identification of a disputed issue of material fact by an interested party. We agree with both contentions.

Initially, we must state our disagreement with respondents' characterization of the holding of the Court of Appeals. They argue that the court's decision was based on a finding that the EPA in this case did not comply with its own regulations governing public participation in the NPDES permit issuance process, rather than on a legal conclusion that the regulations

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[11] Respondents PLF and Kilroy suggest that the writ of certiorari should be dismissed as having been improvidently granted because petitioner has inserted issues in his brief on the merits that were not included within the question presented in his petition for certiorari. We decline the invitation to dismiss the writ. We note, however, that a decision in this case does not require us to resolve petitioner's contention, challenged by respondents as a "new issue," that Congress did not intend adjudicatory hearings under § 402 of the FWPCA to be governed by the formal requirements of an adjudication "on the record" set forth in the Administrative Procedure Act, 5 U. S. C. § 554 (1976 ed. and Supp. II).

are invalid. We conclude, on the contrary, that, although the court did not explicitly hold the regulations to be invalid, its decision renders them essentially meaningless. Rather than permitting the Regional Administrator to decide, in the first instance, whether there is sufficient public interest in a proposed issuance or modification of a permit to justify a public hearing, 40 CFR § 125.34 (a), and to limit any adjudicatory hearing to the situation where an interested party raises a material issue of fact, § 125.36 (c)(1)(ii), the Court of Appeals would require the agency to justify every failure to hold a hearing by proof that the material facts supporting its action "are not subject to dispute." 586 F. 2d, at 659. This holding is contrary to this Court's approval in past decisions of agency rules, similar to those at issue here, that have required an applicant who seeks a hearing to meet a threshold burden of tendering evidence suggesting the need for a hearing. See, *e. g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U. S., at 620–621, and cases cited therein.

Moreover, it is important to note that the regulations described in Part II of this opinion, *supra*, were designed to implement the statutory command that permits be issued "after *opportunity* for public hearing." § 402 (a)(1), 86 Stat. 880, 33 U. S. C. § 1342 (a)(1) (emphasis supplied). In the past, this Court has held that a similar statutory requirement that an "opportunity" for a hearing be provided may be keyed to a *request* for a hearing. See *National Coal Operators' Assn.* v. *Kleppe*, 423 U. S., at 398–399.[12] And only recently

[12] To the extent the Court of Appeals' holding to the contrary relied upon the decision in *Independent Bankers Assn.* v. *Board of Governors*, 170 U. S. App. D. C. 278, 516 F. 2d 1206 (1975), such reliance was misplaced. The passage from that opinion relied upon by the Court of Appeals itself demonstrates that the decision stands for the proposition that a party waives its right to an adjudicatory hearing where it fails to dispute the material facts upon which the agency's decision rests. See *supra*, at 212.

the Court re-emphasized the fundamental administrative law principle that "the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S. 519, 524 (1978).

Neither can we ignore the fact that under the standard applied by the Court of Appeals, the EPA would be required to hold hearings on most of the actions it takes with respect to NPDES permit issuances and modifications. Hearings would be required even in cases, such as this, in which the proposed action only extends a permit's expiration date without at all affecting the substantive conditions that had been considered during earlier hearings. The Administrator advises us that each year the EPA grants about 100 requests for adjudicatory hearings under the NPDES program, issues about 2,200 permits, and takes thousands of actions with respect to permits. Brief for Petitioner 34–35; see *United States Steel Corp.* v. *Train*, 556 F. 2d 822, 834, n. 14 (CA7 1977). Affirmance of the Court of Appeals' rationale obviously would raise serious questions about the EPA's ability to administer the NPDES program. See *Weinberger*, 412 U. S., at 621; *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112, 132–133 (1977).

We recognize the validity of respondents' contention that the legislative history of the FWPCA indicates a strong congressional desire that the public have input in decisions concerning the elimination of water pollution. The FWPCA itself recites:

> "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator . . . under this Act shall be provided for, encouraged, and assisted by the Administrator." § 101 (e), 86 Stat. 817, 33 U. S. C. § 1251 (e).

Passages in the FWPCA's legislative history indicate that this general policy of encouraging public participation is applicable to the administration of the NPDES permit program. See, *e. g.*, 118 Cong. Rec. 37060 (1972) (remarks of Rep. Dingell during debate on override of the President's veto of the FWPCA). The Report of the Committee on Public Works accompanying the Senate bill emphasized that an essential element of the NPDES program is public participation, and that "[t]he public must have a genuine opportunity to speak on the issue of protection of its waters." S. Rep. No. 92–414, p. 72 (1971).

Nonetheless, we conclude that the regulations the EPA has promulgated to implement this congressional policy are fully consistent with the legislative purpose, and are valid. Respondents, in fact, do not contest seriously the proposition that the EPA's regulations are valid on their face; the thrust of their arguments before this Court has been that the EPA, in this instance, failed to apply its regulations consistently with their purpose.

B

Having rejected the Court of Appeals' invalidation of the EPA's public participation regulations, we turn to the issues framed by respondents. First, PLF and Kilroy contend that the EPA's regulations required the Regional Administrator to hold a public hearing in this case because there was a "significant degree of public interest" in the extension of the Hyperion permit. See 40 CFR § 125.34 (a). They also place substantial reliance upon those agency regulations that set general guidelines for public participation in water pollution control. During the period at issue here, one such regulation provided:

> "Where the opportunity for public hearing is called for in the Act, and in other appropriate instances, a public hearing shall be held if the hearing official finds significant public interest (including the filing of requests or

petitions for such hearing) or pertinent information to be gained. Instances of doubt should be resolved in favor of holding the hearing, or if necessary, of providing alternative opportunity for public participation." 40 CFR § 105.7 (c).

Notwithstanding the orientation of these regulations toward the encouragement of public participation in the NPDES permit issuance process, our examination of the record leads us to reject respondents' contention that the EPA failed to comply with its regulations in this case. It is undisputed that the most controversial aspects of the Hyperion permit—the compliance schedule for secondary treatment, the "sludge-out" requirement, and the resultant requirement that the city develop an alternative method of sludge disposal—were all included within the 1975 permit. That permit was issued following EPA publication of advance notice of its tentative determination to revise the initial 1974 permit, and a hearing on the proposed revisions. None of the respondents objected to the issuance of the 1975 permit or requested an adjudicatory hearing. We agree with the position advanced by petitioner that respondents may not reopen consideration of substantive conditions contained within the 1975 permit through hearing requests relating to a proposed permit modification that did not even purport to affect those conditions.

The EPA's determination to modify the 1975 permit by extending its expiration date to December 17, 1979, was made following newspaper publication of the proposed action, including notice of an opportunity for submission of comments and hearing requests. Respondent Los Angeles received an individual notice of the EPA's tentative determination to extend the permit, and raised no objection. Respondents PLF and Kilroy, who argue that the EPA was aware of their interest in the Hyperion permit and their opposition to the Interim Sludge Disposal Project, could have received such individual notice if they had asked to be placed on the EPA's

mailing list for notices of proposed agency actions within the pertinent geographical area. 40 CFR § 125.32 (a)(3). They made no such request. Under the circumstances, we think it reasonable that the Regional Administrator decided to extend the expiration date of the permit without another public hearing, on the grounds that the public had not exhibited a significant degree of interest in the action under consideration, and that information pertinent to such a decision would not have been adduced if a hearing had been held. This simply is not a case in which doubt existed concerning the need for a hearing.

Second, respondents suggest that the EPA's provision of notice to the general public concerning the proposed permit extension was inadequate. The PLF and Kilroy argue that notice by newspaper publication was not adequate to apprise interested parties of the EPA's tentative determination, and was inconsistent with the policy of encouraging public participation that underlies the statute and regulations. Based on our conclusion that the EPA's regulations implementing the rather amorphous "opportunity for public hearing" requirement of § 402 are valid, we have no hesitancy in concluding that the form of notice provided in this case, fully consistent with the regulations, was not inadequate.

Los Angeles argues that it was not given adequate notice of the proposed extension of its permit because it was never informed that the EPA regarded the federal "sludge-out" compliance schedule contained in the 1975 permit not to have been modified by subsequent orders of the CRWQCB. See n. 6, *supra*. This argument was not addressed directly by the Court of Appeals. It would be appropriate, therefore, for this Court not to attempt to resolve it here, even if we had an adequate record to do so. More fundamentally, however, an additional reason dictates that the city's argument not be resolved in the context of this lawsuit at all. Los Angeles claims that the more lenient sludge-out schedule adopted by

the CRWQCB in its order of May 24, 1976 (incorporating within the Hyperion permit a four-phase alternative sludge disposal plan to be completed by April 1, 1980) has been approved by the EPA with respect to the federal permit. The EPA presently takes the position that state modifications of the sludge-out plan, adopted pursuant to California law, did not alter the initial compliance schedule incorporated in the 1975 federal permit. The agency's position will be tested in *United States* v. *City of Los Angeles,* No. CV 77 3047 R (CD Cal., filed Aug. 12, 1977), an enforcement action brought by the Government under § 309 of the FWPCA, 86 Stat. 859, 33 U. S. C. § 1319 (1976 ed. and Supp. II).

The enforcement action seeks to enjoin the city from violating the conditions of its permit and to impose civil penalties against the city for past failures to comply with the permit's schedules. App. 181. It has been stayed by the Court of Appeals pending the outcome of this case. Brief for Petitioner 17, n. 13. The argument that the city raises here concerning its understanding of the compliance schedules will be resolved far more effectively in the Government's enforcement action than in the adjudicatory hearing the Court of Appeals would have awarded respondents in this case.[13] Furthermore, even if the city had raised its argument in a public hearing on the proposed permit extension, that argument would have had little relevance to the EPA's final determination because the EPA's proposed action did not purport to change the substantive conditions that are the focus of the city's complaint.

Finally, respondents suggest that the EPA erred in not holding an adjudicatory hearing on the issues raised in respondent Kilroy's request. We agree with petitioner, however, who contends that Kilroy's request raised legal, rather

[13] The Court of Appeals' stay of the compliance schedules incorporated within the 1975 permit did not remove the basis for the Government's enforcement action. That action challenges several alleged violations of the Hyperion NPDES permit that predated January 1, 1977. App. 183–187. See n. 10, *supra.*

than factual, issues, and who notes that respondents treated the request in that fashion in arguing the issues Kilroy presented before the EPA's General Counsel. See n. 9, *supra*. Even in their arguments before this Court, respondents have continued to raise factual issues that are relevant only to their contention that greater adverse effects on both the marine and land environment will result from the Interim Sludge Disposal Project than from the continued discharge of sludge into the ocean. If such issues had been raised in a timely request for an adjudicatory hearing, we agree with petitioner that the EPA could have taken the position that such issues, regardless of their merits, were not pertinent to a determination to extend the Hyperion permit's expiration date. That determination had no impact on the compliance schedule for "sludge-out" that already had long been in effect.[14]

C

In sum, we hold that the Court of Appeals erred in concluding that the EPA is required to hold a public hearing on every NPDES permit action it takes unless it can show that the material facts supporting its action "are not subject to

[14] Respondents' litigation strategy throughout the proceedings culminating in this opinion seems to have been based, at least in part, on a fear that the EPA may evade further public scrutiny of the compliance schedules incorporated within the 1975 NPDES permit by issuing continued extensions of that permit rather than acting upon the city's application for a new permit. See *supra*, at 205–206. If that potential for evasion ever did exist, it was a limited one. Under § 402 (b) (1) (B) of the FWPCA, the EPA could have set the expiration date for the initial 1975 permit as late as August 1980, and the agency actions that culminated in this lawsuit would have been unnecessary. Now that the outside date for extensions of the 1975 permit is approaching, any additional extension for purposes of avoiding further hearings on the permit's compliance schedules would have little practical impact. We note, as well, that Los Angeles, under the Administrative Procedure Act, 5 U. S. C. § 706 (1) (a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed") may obtain judicial review of prolonged agency inaction with respect to its application for a new permit.

dispute." We hold, rather, that the agency's regulations implementing the statutory requirement of "an opportunity for public hearing" under § 402 of the FWPCA are valid. Respondents have failed to demonstrate that those regulations were not applied properly in the context of this case. The Court of Appeals' judgment remanding the case to the agency for an adjudicatory hearing on the EPA's extension of the expiration date of Los Angeles' NPDES permit for its Hyperion Wastewater Treatment Plant is reversed.

*It is so ordered.*

# CHIARELLA *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78–1202. Argued November 5, 1979—Decided March 18, 1980

Section 10 (b) of the Securities Exchange Act of 1934 prohibits the use "in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." Rule 10b–5 of the Securities and Exchange Commission (SEC), promulgated under § 10 (b), makes it unlawful for any person to "employ any device, scheme, or artifice to defraud," or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." Petitioner, who was employed by a financial printer that had been engaged by certain corporations to print corporate takeover bids, deduced the names of the target companies from information contained in documents delivered to the printer by the acquiring companies and, without disclosing his knowledge, purchased stock in the target companies and sold the shares immediately after the takeover attempts were made public. After the SEC began an investigation of his trading activities, petitioner entered into a consent decree with the SEC in which he agreed to return his profits to the sellers of the shares. Thereafter, petitioner was indicted and convicted for violating § 10 (b) of the Act and SEC Rule 10b–5. The District Court's charge permitted the jury to convict the petitioner if it found that he willfully failed to inform sellers of target company securities that he knew of a forthcoming takeover bid that would make their shares more valuable. Petitioner's conviction was affirmed by the Court of Appeals.

*Held:* Petitioner's conduct did not constitute a violation of § 10 (b), and hence his conviction was improper. Pp. 225–237.

(a) Administrative and judicial interpretations have established that silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10 (b) despite the absence of statutory language or legislative history specifically addressing the legality of nondisclosure. However, such liability is premised upon a duty to disclose (such as that of a corporate insider to shareholders of his cor-

poration) arising from a relationship of trust and confidence between parties to a transaction. Pp. 225–230.

(b) Here, petitioner had no affirmative duty to disclose the information as to the plans of the acquiring companies. He was not a corporate insider, and he received no confidential information from the target companies. Nor could any duty arise from petitioner's relationship with the sellers of the target companies' securities, for he had no prior dealings with them, was not their agent, was not a fiduciary, and was not a person in whom the sellers had placed their trust and confidence. A duty to disclose under § 10 (b) does not arise from the mere possession of nonpublic market information. Pp. 231–235.

(c) This Court need not decide whether petitioner's conviction can be supported on the alternative theory that he breached a duty to the acquiring corporation, since such theory was not submitted to the jury. The jury instructions demonstrate that petitioner was convicted merely because of his failure to disclose material, nonpublic information to sellers from whom he bought the stock of target corporations. The conviction cannot be affirmed on the basis of a theory not presented to the jury. Pp. 235–237.

588 F. 2d 1358, reversed.

POWELL, J., delivered the opinion of the Court, in which STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 237. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 238. BURGER, C. J., filed a dissenting opinion, *post*, p. 239. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 245.

*Stanley S. Arkin* argued the cause for petitioner. With him on the briefs were *Mark S. Arisohn* and *Arthur T. Cambouris*.

*Stephen M. Shapiro* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Geller, Sara Criscitelli, John S. Siffert, Ralph C. Ferrara,* and *Paul Gonson.**

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**Arthur Fleischer, Jr., Harvey L. Pitt, Richard A. Steinwurtzel,* and *Richard O. Scribner* filed a memorandum for the Securities Industry Association as *amicus curiae*.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a person who learns from the confidential documents of one corporation that it is planning an attempt to secure control of a second corporation violates § 10 (b) of the Securities Exchange Act of 1934 if he fails to disclose the impending takeover before trading in the target company's securities.

## I

Petitioner is a printer by trade. In 1975 and 1976, he worked as a "markup man" in the New York composing room of Pandick Press, a financial printer. Among documents that petitioner handled were five announcements of corporate takeover bids. When these documents were delivered to the printer, the identities of the acquiring and target corporations were concealed by blank spaces or false names. The true names were sent to the printer on the night of the final printing.

The petitioner, however, was able to deduce the names of the target companies before the final printing from other information contained in the documents. Without disclosing his knowledge, petitioner purchased stock in the target companies and sold the shares immediately after the takeover attempts were made public.[1] By this method, petitioner realized a gain of slightly more than $30,000 in the course of 14 months. Subsequently, the Securities and Exchange Commission (Commission or SEC) began an investigation of his trading activities. In May 1977, petitioner entered into a consent decree with the Commission in which he agreed to return his profits to the sellers of the shares.[2] On the same day, he was discharged by Pandick Press.

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[1] Of the five transactions, four involved tender offers and one concerned a merger. 588 F. 2d 1358, 1363, n. 2 (CA2 1978).

[2] *SEC v. Chiarella*, No. 77 Civ. Action No. 2534 (GLG) (SDNY May 24, 1977).

In January 1978, petitioner was indicted on 17 counts of violating § 10 (b) of the Securities Exchange Act of 1934 (1934 Act) and SEC Rule 10b–5.[3] After petitioner unsuccessfully moved to dismiss the indictment,[4] he was brought to trial and convicted on all counts.

The Court of Appeals for the Second Circuit affirmed petitioner's conviction. 588 F. 2d 1358 (1978). We granted certiorari, 441 U. S. 942 (1979), and we now reverse.

## II

Section 10 (b) of the 1934 Act, 48 Stat. 891, 15 U. S. C. § 78j, prohibits the use "in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." Pursuant to this section, the SEC promulgated Rule 10b–5 which provides in pertinent part: [5]

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

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[3] Section 32 (a) of the 1934 Act sanctions criminal penalties against any person who willfully violates the Act. 15 U. S. C. § 78ff (a) (1976 ed., Supp. II). Petitioner was charged with 17 counts of violating the Act because he had received 17 letters confirming purchase of shares.

[4] 450 F. Supp. 95 (SDNY 1978).

[5] Only Rules 10b–5 (a) and (c) are at issue here. Rule 10b–5 (b) provides that it shall be unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 CFR § 240.10b–5 (b) (1979). The portion of the indictment based on this provision was dismissed because the petitioner made no statements at all in connection with the purchase of stock.

"(a) To employ any device, scheme, or artifice to defraud, [or]

. . . . . .

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (1979).

This case concerns the legal effect of the petitioner's silence. The District Court's charge permitted the jury to convict the petitioner if it found that he willfully failed to inform sellers of target company securities that he knew of a forthcoming takeover bid that would make their shares more valuable.[6] In order to decide whether silence in such circumstances violates § 10 (b), it is necessary to review the language and legislative history of that statute as well as its interpretation by the Commission and the federal courts.

Although the starting point of our inquiry is the language of the statute, *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 197 (1976), § 10 (b) does not state whether silence may constitute a manipulative or deceptive device. Section 10 (b) was designed as a catchall clause to prevent fraudulent practices. 425 U. S., at 202, 206. But neither the legislative history nor the statute itself affords specific guidance for the resolution of this case. When Rule 10b–5 was promulgated in 1942, the SEC did not discuss the possibility that failure to provide information might run afoul of § 10 (b).[7]

The SEC took an important step in the development of § 10 (b) when it held that a broker-dealer and his firm violated that section by selling securities on the basis of undisclosed information obtained from a director of the issuer corporation who was also a registered representative of the brokerage firm. In *Cady, Roberts & Co.*, 40 S. E. C. 907

[6] Record 682–683, 686.

[7] See SEC Securities Exchange Act Release No. 3230 (May 21, 1942), 7 Fed. Reg. 3804 (1942).

(1961), the Commission decided that a corporate insider must abstain from trading in the shares of his corporation unless he has first disclosed all material inside information known to him. The obligation to disclose or abstain derives from

> "[a]n affirmative duty to disclose material information[, which] has been traditionally imposed on corporate 'insiders,' particularly officers, directors, or controlling stockholders. We, and the courts have consistently held that insiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment." *Id.*, at 911.

The Commission emphasized that the duty arose from (i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure. *Id.*, at 912, and n. 15.[8]

That the relationship between a corporate insider and the stockholders of his corporation gives rise to a disclosure obligation is not a novel twist of the law. At common law, misrepresentation made for the purpose of inducing reliance

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[8] In *Cady, Roberts*, the broker-dealer was liable under § 10 (b) because it received nonpublic information from a corporate insider of the issuer. Since the insider could not use the information, neither could the partners in the brokerage firm with which he was associated. The transaction in *Cady, Roberts* involved sale of stock to persons who previously may not have been shareholders in the corporation. 40 S. E. C., at 913, and n. 21. The Commission embraced the reasoning of Judge Learned Hand that "the director or officer assumed a fiduciary relation to the buyer by the very sale; for it would be a sorry distinction to allow him to use the advantage of his position to induce the buyer into the position of a beneficiary although he was forbidden to do so once the buyer had become one." *Id.*, at 914, n. 23, quoting *Gratz* v. *Claughton*, 187 F. 2d 46, 49 (CA2), cert. denied, 341 U. S. 920 (1951).

upon the false statement is fraudulent. But one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information "that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." [9] In its *Cady, Roberts* decision, the Commission recognized a relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation.[10] This relationship gives rise to a duty to disclose because of the "necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of the

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[9] Restatement (Second) of Torts § 551 (2)(a) (1976). See James & Gray, Misrepresentation—Part II, 37 Md. L. Rev. 488, 523–527 (1978). As regards securities transactions, the American Law Institute recognizes that "silence when there is a duty to . . . speak may be a fraudulent act." ALI, Federal Securities Code § 262 (b) (Prop. Off. Draft 1978).

[10] See 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 838 (rev. 1975); 3A *id.*, §§ 1168.2, 1171, 1174; 3 L. Loss, Securities Regulation 1446–1448 (2d ed. 1961); 6 *id.*, at 3557–3558 (1969 Supp.). See also *Brophy* v. *Cities Service Co.*, 31 Del. Ch. 241, 70 A. 2d 5 (1949). See generally Note, Rule 10b–5: Elements of a Private Right of Action, 43 N. Y. U. L. Rev. 541, 552–553, and n. 71 (1968); 75 Harv. L. Rev. 1449, 1450 (1962); Daum & Phillips, The Implications of Cady, Roberts, 17 Bus. L. 939, 945 (1962).

The dissent of MR. JUSTICE BLACKMUN suggests that the "special facts" doctrine may be applied to find that silence constitutes fraud where one party has superior information to another. *Post*, at 247–248. This Court has never so held. In *Strong* v. *Repide*, 213 U. S. 419, 431–434 (1909), this Court applied the special-facts doctrine to conclude that a corporate insider had a duty to disclose to a shareholder. In that case, the majority shareholder of a corporation secretly purchased the stock of another shareholder without revealing that the corporation, under the insider's direction, was about to sell corporate assets at a price that would greatly enhance the value of the stock. The decision in *Strong* v. *Repide* was premised upon the fiduciary duty between the corporate insider and the shareholder. See *Pepper* v. *Litton*, 308 U. S. 295, 307, n. 15 (1939).

uninformed minority stockholders." *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 829 (Del. 1951).

The federal courts have found violations of § 10 (b) where corporate insiders used undisclosed information for their own benefit. *E. g., SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833 (CA2 1968), cert. denied, 404 U. S. 1005 (1971). The cases also have emphasized, in accordance with the common-law rule, that "[t]he party charged with failing to disclose market information must be under a duty to disclose it." *Frigitemp Corp.* v. *Financial Dynamics Fund, Inc.*, 524 F. 2d 275, 282 (CA2 1975). Accordingly, a purchaser of stock who has no duty to a prospective seller because he is neither an insider nor a fiduciary has been held to have no obligation to reveal material facts. See *General Time Corp.* v. *Talley Industries, Inc.*, 403 F. 2d 159, 164 (CA2 1968), cert. denied, 393 U. S. 1026 (1969).[11]

This Court followed the same approach in *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972). A group of American Indians formed a corporation to manage joint assets derived from tribal holdings. The corporation issued stock to its Indian shareholders and designated a local bank as its transfer agent. Because of the speculative nature of the corporate assets and the difficulty of ascertaining the true value of a share, the corporation requested the bank to stress to its stockholders the importance of retaining the stock. *Id.*, at 146. Two of the bank's assistant managers aided the shareholders in disposing of stock which the managers knew was traded in two separate markets—a primary market of

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[11] See also *SEC* v. *Great American Industries, Inc.*, 407 F. 2d 453, 460 (CA2 1968), cert. denied, 395 U. S. 920 (1969); *Kohler* v. *Kohler Co.*, 319 F. 2d 634, 637–638 (CA7 1963); Note, 43 N. Y. U. L. Rev., *supra* n. 10, at 554; Note, The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b–5, 33 U. Chi. L. Rev. 359, 373–374 (1966). See generally Note, Civil Liability under Rule X–10b–5, 42 Va. L. Rev. 537, 554–561 (1956).

Indians selling to non-Indians through the bank and a resale market consisting entirely of non-Indians. Indian sellers charged that the assistant managers had violated § 10 (b) and Rule 10b–5 by failing to inform them of the higher prices prevailing in the resale market. The Court recognized that no duty of disclosure would exist if the bank merely had acted as a transfer agent. But the bank also had assumed a duty to act on behalf of the shareholders, and the Indian sellers had relied upon its personnel when they sold their stock. 406 U. S., at 152. Because these officers of the bank were charged with a responsibility to the shareholders, they could not act as market makers inducing the Indians to sell their stock without disclosing the existence of the more favorable non-Indian market. *Id.*, at 152–153.

Thus, administrative and judicial interpretations have established that silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10 (b) despite the absence of statutory language or legislative history specifically addressing the legality of nondisclosure. But such liability is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction. Application of a duty to disclose prior to trading guarantees that corporate insiders, who have an obligation to place the shareholder's welfare before their own, will not benefit personally through fraudulent use of material, nonpublic information.[12]

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[12] "Tippees" of corporate insiders have been held liable under § 10 (b) because they have a duty not to profit from the use of inside information that they know is confidential and know or should know came from a corporate insider, *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F. 2d 228, 237–238 (CA2 1974). The tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty. Subcommittees of American Bar Association Section of Corporation, Banking, and Business Law, Comment Letter on Material, Non-Public Information (Oct. 15, 1973), reprinted in BNA, Securities Regulation & Law Report No. 233, pp. D–1, D–2 (Jan. 2, 1974).

## III

In this case, the petitioner was convicted of violating § 10 (b) although he was not a corporate insider and he received no confidential information from the target company. Moreover, the "market information" upon which he relied did not concern the earning power or operations of the target company, but only the plans of the acquiring company.[13] Petitioner's use of that information was not a fraud under § 10 (b) unless he was subject to an affirmative duty to disclose it before trading. In this case, the jury instructions failed to specify any such duty. In effect, the trial court instructed the jury that petitioner owed a duty to everyone; to all sellers, indeed, to the market as a whole. The jury simply was told to decide whether petitioner used material, nonpublic information at a time when "he knew other people trading in the securities market did not have access to the same information." Record 677.

The Court of Appeals affirmed the conviction by holding that "[*a*]*nyone*—corporate insider or not—who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose." 588 F. 2d, at 1365 (emphasis in original). Although the court said that its test would include only persons who regularly receive material, nonpublic information, *id.*, at 1366, its rationale for that limitation is unrelated to the existence of a duty to disclose.[14] The Court of

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[13] See Fleischer, Mundheim, & Murphy, An Initial Inquiry into the Responsibility to Disclose Market Information, 121 U. Pa. L. Rev. 798, 799 (1973).

[14] The Court of Appeals said that its "regular access to market information" test would create a workable rule embracing "those who occupy . . . strategic places in the market mechanism." 588 F. 2d, at 1365. These considerations are insufficient to support a duty to disclose. A duty arises from the relationship between parties, see nn. 9 and 10, *supra*, and

Appeals, like the trial court, failed to identify a relationship between petitioner and the sellers that could give rise to a duty. Its decision thus rested solely upon its belief that the federal securities laws have "created a system providing equal access to information necessary for reasoned and intelligent investment decisions." *Id.*, at 1362. The use by anyone of material information not generally available is fraudulent, this theory suggests, because such information gives certain buyers or sellers an unfair advantage over less informed buyers and sellers.

This reasoning suffers from two defects. First, not every instance of financial unfairness constitutes fraudulent activity under § 10 (b). See *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 474–477 (1977). Second, the element required to make silence fraudulent—a duty to disclose—is absent in this case. No duty could arise from petitioner's relationship with the sellers of the target company's securities, for petitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a com-

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accompanying text, and not merely from one's ability to acquire information because of his position in the market.

The Court of Appeals also suggested that the acquiring corporation itself would not be a "market insider" because a tender offeror creates, rather than receives, information and takes a substantial economic risk that its offer will be unsuccessful. 588 F. 2d, at 1366–1367. Again, the Court of Appeals departed from the analysis appropriate to recognition of a duty. The Court of Appeals for the Second Circuit previously held, in a manner consistent with our analysis here, that a tender offeror does not violate § 10 (b) when it makes preannouncement purchases precisely because there is no relationship between the offeror and the seller:

"We know of no rule of law . . . that a purchaser of stock, who was not an 'insider' and had no fiduciary relation to a prospective seller, had any obligation to reveal circumstances that might raise a seller's demands and thus abort the sale." *General Time Corp.* v. *Talley Industries, Inc.*, 403 F. 2d 159, 164 (1968), cert. denied, 393 U. S. 1026 (1969).

plete stranger who dealt with the sellers only through impersonal market transactions.

We cannot affirm petitioner's conviction without recognizing a general duty between all participants in market transactions to forgo actions based on material, nonpublic information. Formulation of such a broad duty, which departs radically from the established doctrine that duty arises from a specific relationship between two parties, see n. 9, *supra*, should not be undertaken absent some explicit evidence of congressional intent.

As we have seen, no such evidence emerges from the language or legislative history of § 10 (b). Moreover, neither the Congress nor the Commission ever has adopted a parity-of-information rule. Instead the problems caused by misuse of market information have been addressed by detailed and sophisticated regulation that recognizes when use of market information may not harm operation of the securities markets. For example, the Williams Act [15] limits but does not completely prohibit a tender offeror's purchases of target corporation stock before public announcement of the offer. Congress' careful action in this and other areas [16] contrasts, and

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[15] Title 15 U. S. C. § 78m (d)(1) (1976 ed., Supp. II) permits a tender offeror to purchase 5% of the target company's stock prior to disclosure of its plan for acquisition.

[16] Section 11 of the 1934 Act generally forbids a member of a national securities exchange from effecting any transaction on the exchange for its own account. 15 U. S. C. § 78k (a)(1). But Congress has specifically exempted specialists from this prohibition—broker-dealers who execute orders for customers trading in a specific corporation's stock, while at the same time buying and selling that corporation's stock on their own behalf. § 11 (a)(1)(A), 15 U. S. C. § 78k (a)(1)(A); see S. Rep. No. 94-75, p. 99 (1975); Securities and Exchange Commission, Report of Special Study of Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st Sess., pt. 2, pp. 57-58, 76 (1963). See generally S. Robbins, The Securities Markets 191-193 (1966). The exception is based upon Congress' recognition that specialists contribute to a fair and orderly marketplace at the same time they exploit the informational advantage that comes from their pos-

is in some tension, with the broad rule of liability we are asked to adopt in this case.

Indeed, the theory upon which the petitioner was convicted is at odds with the Commission's view of § 10 (b) as applied to activity that has the same effect on sellers as the petitioner's purchases. "Warehousing" takes place when a corporation gives advance notice of its intention to launch a tender offer to institutional investors who then are able to purchase stock in the target company before the tender offer is made public and the price of shares rises.[17] In this case, as in warehousing, a buyer of securities purchases stock in a target corporation on the basis of market information which is unknown to the seller. In both of these situations, the seller's behavior presumably would be altered if he had the nonpublic information. Significantly, however, the Commission has acted to bar warehousing under its authority to regulate tender offers[18] after recognizing that action under § 10 (b) would rest on a "somewhat different theory" than that previously used to regulate insider trading as fraudulent activity.[19]

We see no basis for applying such a new and different theory of liability in this case. As we have emphasized before, the 1934 Act cannot be read " 'more broadly than its language and the statutory scheme reasonably permit.' " *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578 (1979), quoting *SEC* v. *Sloan*, 436 U. S. 103, 116 (1978). Section 10 (b) is aptly

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session of buy and sell orders. H. R. Doc. No. 95, *supra*, at 78–80. Similar concerns with the functioning of the market prompted Congress to exempt market makers, block positioners, registered odd-lot dealers, bona fide arbitrageurs, and risk arbitrageurs from § 11's general prohibition on member trading. 15 U. S. C. §§ 78k (a) (1) (A)–(D); see S. Rep. No. 94–75, *supra*, at 99. See also Securities Exchange Act Release No. 34–9950, 38 Fed. Reg. 3902, 3918 (1973).

[17] Fleischer, Mundheim, & Murphy, *supra* n. 13, at 811–812.

[18] SEC Proposed Rule § 240.14e–3, 44 Fed. Reg. 70352–70355, 70359 (1979).

[19] 1 SEC Institutional Investor Study Report, H. R. Doc. No. 92–64, pt. 1, p. xxxii (1971).

described as a catchall provision, but what it catches must be fraud. When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak. We hold that a duty to disclose under § 10 (b) does not arise from the mere possession of nonpublic market information. The contrary result is without support in the legislative history of § 10 (b) and would be inconsistent with the careful plan that Congress has enacted for regulation of the securities markets. Cf. *Santa Fe Industries, Inc.* v. *Green*, 430 U. S., at 479.[20]

## IV

In its brief to this Court, the United States offers an alternative theory to support petitioner's conviction. It argues that petitioner breached a duty to the acquiring corporation when he acted upon information that he obtained by virtue of his position as an employee of a printer employed by the corporation. The breach of this duty is said to support a

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[20] MR. JUSTICE BLACKMUN's dissent would establish the following standard for imposing criminal and civil liability under § 10 (b) and Rule 10b–5:

"[P]ersons having access to confidential material information that is not legally available to others generally are prohibited . . . from engaging in schemes to exploit their structural informational advantage through trading in affected securities." *Post*, at 251.

This view is not substantially different from the Court of Appeals' theory that anyone "who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose," 588 F. 2d, at 1365, and must be rejected for the reasons stated in Part III. Additionally, a judicial holding that certain undefined activities "generally are prohibited" by § 10 (b) would raise questions whether either criminal or civil defendants would be given fair notice that they have engaged in illegal activity. Cf. *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972).

It is worth noting that this is apparently the first case in which criminal liability has been imposed upon a purchaser for § 10 (b) nondisclosure. Petitioner was sentenced to a year in prison, suspended except for one month, and a 5-year term of probation. 588 F. 2d, at 1373, 1378 (Meskill, J., dissenting).

conviction under § 10 (b) for fraud perpetrated upon both the acquiring corporation and the sellers.

We need not decide whether this theory has merit for it was not submitted to the jury. The jury was told, in the language of Rule 10b–5, that it could convict the petitioner if it concluded that he either (i) employed a device, scheme, or artifice to defraud or (ii) engaged in an act, practice, or course of business which operated or would operate as a fraud or deceit upon any person. Record 681. The trial judge stated that a "scheme to defraud" is a plan to obtain money by trick or deceit and that "a failure by Chiarella to disclose material, non-public information in connection with his purchase of stock would constitute deceit." *Id.*, at 683. Accordingly, the jury was instructed that the petitioner employed a scheme to defraud if he "did not disclose . . . material nonpublic information in connection with the purchases of the stock." *Id.*, at 685–686.

Alternatively, the jury was instructed that it could convict if "Chiarella's alleged conduct of having purchased securities without disclosing material, non-public information would have or did have the effect of operating as a fraud upon a seller." *Id.*, at 686. The judge earlier had stated that fraud "embraces all the means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false misrepresentation, suggestions or by suppression of the truth." *Id.*, at 683.

The jury instructions demonstrate that petitioner was convicted merely because of his failure to disclose material, nonpublic information to sellers from whom he bought the stock of target corporations. The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers. Because we cannot affirm a criminal conviction on the basis of a theory not presented to the jury, *Rewis* v. *United States*, 401 U. S. 808, 814 (1971), see *Dunn* v. *United States*, 442 U. S. 100, 106 (1979), we will not speculate upon whether such a duty exists, whether it has been

breached, or whether such a breach constitutes a violation of § 10 (b).[21]

The judgment of the Court of Appeals is

*Reversed.*

MR. JUSTICE STEVENS, concurring.

Before liability, civil or criminal, may be imposed for a Rule 10b–5 violation, it is necessary to identify the duty that the defendant has breached. Arguably, when petitioner bought securities in the open market, he violated (a) a duty to disclose owed to the sellers from whom he purchased target company stock and (b) a duty of silence owed to the acquiring companies. I agree with the Court's determination that petitioner owed no duty of disclosure to the sellers, that his conviction rested on the erroneous premise that he did owe them such a duty, and that the judgment of the Court of Appeals must therefore be reversed.

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[21] The dissent of THE CHIEF JUSTICE relies upon a single phrase from the jury instructions, which states that the petitioner held a "confidential position" at Pandick Press, to argue that the jury was properly instructed on the theory "that a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading." *Post*, at 240. The few words upon which this thesis is based do not explain to the jury the nature and scope of the petitioner's duty to his employer, the nature and scope of petitioner's duty, if any, to the acquiring corporation, or the elements of the tort of misappropriation. Nor do the jury instructions suggest that a "confidential position" is a necessary element of the offense for which petitioner was charged. Thus, we do not believe that a "misappropriation" theory was included in the jury instructions.

The conviction would have to be reversed even if the jury had been instructed that it could convict the petitioner either (1) because of his failure to disclose material, nonpublic information to sellers or (2) because of a breach of a duty to the acquiring corporation. We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct. *United States* v. *Gallagher*, 576 F. 2d 1028, 1046 (CA3 1978); see *Leary* v. *United States*, 395 U. S. 6, 31–32 (1969); *Stromberg* v. *California*, 283 U. S. 359, 369–370 (1931).

The Court correctly does not address the second question: whether the petitioner's breach of his duty of silence—a duty he unquestionably owed to his employer and to his employer's customers—could give rise to criminal liability under Rule 10b–5. Respectable arguments could be made in support of either position. On the one hand, if we assume that petitioner breached a duty to the acquiring companies that had entrusted confidential information to his employers, a legitimate argument could be made that his actions constituted "a fraud or a deceit" upon those companies "in connection with the purchase or sale of any security."* On the other hand, inasmuch as those companies would not be able to recover damages from petitioner for violating Rule 10b–5 because they were neither purchasers nor sellers of target company securities, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, it could also be argued that no actionable violation of Rule 10b–5 had occurred. I think the Court wisely leaves the resolution of this issue for another day.

I write simply to emphasize the fact that we have not necessarily placed any stamp of approval on what this petitioner did, nor have we held that similar actions must be considered lawful in the future. Rather, we have merely held that petitioner's criminal conviction cannot rest on the theory that he breached a duty he did not owe.

I join the Court's opinion.

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court holds, correctly in my view, that "a duty to disclose under § 10 (b) does not arise from the mere posses-

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*See *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654 (CA7 1973), cert. denied, 416 U. S. 960. The specific holding in *Eason* was rejected in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723. However, the limitation on the right to recover pecuniary damages in a private action identified in *Blue Chip* is not necessarily coextensive with the limits of the rule itself. Cf. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 42, n. 28, 43, n. 30, 47, n. 33.

sion of nonpublic market information." *Ante*, at 235. Prior to so holding, however, it suggests that no violation of § 10 (b) could be made out absent a breach of some duty arising out of a fiduciary relationship between buyer and seller. I cannot subscribe to that suggestion. On the contrary, it seems to me that Part I of THE CHIEF JUSTICE's dissent, *post*, at 239–243, correctly states the applicable substantive law—a person violates § 10 (b) whenever he improperly obtains or converts to his own benefit nonpublic information which he then uses in connection with the purchase or sale of securities.

While I agree with Part I of THE CHIEF JUSTICE's dissent, I am unable to agree with Part II. Rather, I concur in the judgment of the majority because I think it clear that the legal theory sketched by THE CHIEF JUSTICE is not the one presented to the jury. As I read them, the instructions in effect permitted the jurors to return a verdict of guilty merely upon a finding of failure to disclose material, nonpublic information in connection with the purchase of stock. I can find no instruction suggesting that one element of the offense was the improper conversion or misappropriation of that nonpublic information. Ambiguous suggestions in the indictment and the prosecutor's opening and closing remarks are no substitute for the proper instructions. And neither reference to the harmless-error doctrine nor some *post hoc* theory of constructive stipulation can cure the defect. The simple fact is that to affirm the conviction without an adequate instruction would be tantamount to directing a verdict of guilty, and that we plainly may not do.

MR. CHIEF JUSTICE BURGER, dissenting.

I believe that the jury instructions in this case properly charged a violation of § 10 (b) and Rule 10b–5, and I would affirm the conviction.

I

As a general rule, neither party to an arm's-length business transaction has an obligation to disclose information to the

other unless the parties stand in some confidential or fiduciary relation. See W. Prosser, Law of Torts § 106 (2d ed. 1955). This rule permits a businessman to capitalize on his experience and skill in securing and evaluating relevant information; it provides incentive for hard work, careful analysis, and astute forecasting. But the policies that underlie the rule also should limit its scope. In particular, the rule should give way when an informational advantage is obtained, not by superior experience, foresight, or industry, but by some unlawful means. One commentator has written:

> "[T]he way in which the buyer acquires the information which he conceals from the vendor should be a material circumstance. The information might have been acquired as the result of his bringing to bear a superior knowledge, intelligence, skill or technical judgment; it might have been acquired by mere chance; or it might have been acquired by means of some tortious action on his part. . . . *Any time information is acquired by an illegal act it would seem that there should be a duty to disclose that information.*" Keeton, Fraud—Concealment and Non-Disclosure, 15 Texas L. Rev. 1, 25–26 (1936) (emphasis added).

I would read § 10 (b) and Rule 10b–5 to encompass and build on this principle: to mean that a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading.

The language of § 10 (b) and of Rule 10b–5 plainly supports such a reading. By their terms, these provisions reach *any* person engaged in *any* fraudulent scheme. This broad language negates the suggestion that congressional concern was limited to trading by "corporate insiders" or to deceptive practices related to "corporate information."[1] Just as surely

[1] Academic writing in recent years has distinguished between "corporate information"—information which comes from within the corporation

Congress cannot have intended one standard of fair dealing for "white collar" insiders and another for the "blue collar" level. The very language of § 10 (b) and Rule 10b–5 "by repeated use of the word 'any' [was] obviously meant to be inclusive." *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972).

The history of the statute and of the Rule also supports this reading. The antifraud provisions were designed in large measure "to assure that dealing in securities is fair and without undue preferences or advantages among investors." H. R. Conf. Rep. No. 94–229, p. 91 (1975). These provisions prohibit "those manipulative and deceptive practices which have been demonstrated to fulfill no useful function." S. Rep. No. 792, 73d Cong., 2d Sess., 6 (1934). An investor who purchases securities on the basis of misappropriated nonpublic information possesses just such an "undue" trading advantage; his conduct quite clearly serves no useful function except his own enrichment at the expense of others.

This interpretation of § 10 (b) and Rule 10b–5 is in no sense novel. It follows naturally from legal principles enunciated by the Securities and Exchange Commission in its seminal *Cady, Roberts* decision. 40 S. E. C. 907 (1961). There, the Commission relied upon two factors to impose a duty to disclose on corporate insiders: (1) ". . . access . . . to information intended to be available only for a corporate purpose *and not for the personal benefit of anyone*" (emphasis added); and (2) the unfairness inherent in trading on such information when it is inaccessible to those with whom one is dealing. Both of these factors are present whenever a party gains an

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and reflects on expected earnings or assets—and "market information." See, *e. g.*, Fleischer, Mundheim, & Murphy, An Initial Inquiry into the Responsibility to Disclose Market Information, 121 U. Pa. L. Rev. 798, 799 (1973). It is clear that § 10 (b) and Rule 10b–5 by their terms and by their history make no such distinction. See Brudney, Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws, 93 Harv. L. Rev. 322, 329–333 (1979).

informational advantage by unlawful means.[2] Indeed, in *In re Blyth & Co.*, 43 S. E. C. 1037 (1969), the Commission applied its *Cady, Roberts* decision in just such a context. In that case a broker-dealer had traded in Government securities on the basis of confidential Treasury Department information which it received from a Federal Reserve Bank employee. The Commission ruled that the trading was "improper use of inside information" in violation of § 10 (b) and Rule 10b–5. 43 S. E. C., at 1040. It did not hesitate to extend *Cady, Roberts* to reach a "tippee" of a Government insider.[3]

Finally, it bears emphasis that this reading of § 10b and Rule 10b–5 would not threaten legitimate business practices. So read, the antifraud provisions would not impose a duty on a tender offeror to disclose its acquisition plans during the period in which it "tests the water" prior to purchasing a full 5% of the target company's stock. Nor would it proscribe "warehousing." See generally SEC, Institutional Investor Study Report, H. R. Doc. No. 92–64, pt. 4, p. 2273 (1971). Likewise, market specialists would not be subject to a disclose-or-refrain requirement in the performance of their every-

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[2] See Financial Analysts Rec., Oct. 7, 1968, pp. 3, 5 (interview with SEC General Counsel Philip A. Loomis, Jr.) (the essential characteristic of insider information is that it is "received in confidence for a purpose other than to use it for the person's own advantage and to the disadvantage of the investing public in the market"). See also Note, The Government Insider and Rule 10b–5: A New Application for an Expanding Doctrine, 47 S. Cal. L. Rev. 1491, 1498–1502 (1974).

[3] This interpretation of the antifraud provisions also finds support in the recently proposed Federal Securities Code prepared by the American Law Institute under the direction of Professor Louis Loss. The ALI Code would construe the antifraud provisions to cover a class of "quasi-insiders," including a judge's law clerk who trades on information in an unpublished opinion or a Government employee who trades on a secret report. See ALI Federal Securities Code § 1603, comment 3 (d), pp. 538–539 (Prop. Off. Draft 1978). These quasi-insiders share the characteristic that their informational advantage is obtained by conversion and not by legitimate economic activity that society seeks to encourage.

day market functions. In each of these instances, trading is accomplished on the basis of material, nonpublic information, but the information has not been unlawfully converted for personal gain.

## II

The Court's opinion, as I read it, leaves open the question whether § 10 (b) and Rule 10b–5 prohibit trading on misappropriated nonpublic information.[4] Instead, the Court apparently concludes that this theory of the case was not submitted to the jury. In the Court's view, the instructions given the jury were premised on the erroneous notion that the mere failure to disclose nonpublic information, however acquired, is a deceptive practice. And because of this premise, the jury was not instructed that the means by which Chiarella acquired his informational advantage—by violating a duty owed to the acquiring companies—was an element of the offense. See *ante*, at 236.

The Court's reading of the District Court's charge is unduly restrictive. Fairly read as a whole and in the context of the trial, the instructions required the jury to find that Chiarella obtained his trading advantage by misappropriating the property of his employer's customers. The jury was charged that "[i]n simple terms, the charge is that Chiarella wrongfully took advantage of information he acquired *in the course of his confidential position at Pandick Press* and secretly used that information when he knew other people trading in the securities market did not have access to the same information

[4] There is some language in the Court's opinion to suggest that only "a relationship between petitioner and the sellers . . . could give rise to a duty [to disclose]." *Ante*, at 232. The Court's holding, however, is much more limited, namely, that mere possession of material, nonpublic information is insufficient to create a duty to disclose or to refrain from trading. *Ante*, at 235. Accordingly, it is my understanding that the Court has not rejected the view, advanced above, that an absolute duty to disclose or refrain arises from the very act of misappropriating nonpublic information.

that he had at a time when he knew that that information was material to the value of the stock." Record 677 (emphasis added). The language parallels that in the indictment, and the jury had that indictment during its deliberations; it charged that Chiarella had traded "without disclosing the material non-public information he had obtained in connection with his employment." It is underscored by the clarity which the prosecutor exhibited in his opening statement to the jury. No juror could possibly have failed to understand what the case was about after the prosecutor said: "In sum what the indictment charges is that Chiarella misused material non-public information for personal gain and that he took unfair advantage of his position of trust with the full knowledge that it was wrong to do so. That is what the case is about. It is that simple." *Id.*, at 46. Moreover, experienced defense counsel took no exception and uttered no complaint that the instructions were inadequate in this regard.

In any event, even assuming the instructions were deficient in not charging misappropriation with sufficient precision, on this record any error was harmless beyond a reasonable doubt. Here, Chiarella, himself, testified that he obtained his informational advantage by decoding confidential material entrusted to his employer by its customers. *Id.*, at 474–475. He admitted that the information he traded on was "confidential," not "to be use[d] . . . for personal gain." *Id.*, at 496. In light of this testimony, it is simply inconceivable to me that any shortcoming in the instructions could have "possibly influenced the jury adversely to [the defendant]." *Chapman* v. *California*, 386 U. S. 18, 23 (1967). See also *United States* v. *Park*, 421 U. S. 658, 673–676 (1975). Even more telling perhaps is Chiarella's counsel's statement in closing argument:

> "Let me say right up front, too, Mr. Chiarella got on the stand and he conceded, he said candidly, 'I used clues I got while I was at work. I looked at these various doc-

> uments and I deciphered them and I decoded them and I used that information as a basis for purchasing stock.' There is no question about that. We don't have to go through a hullabaloo about that. It is something he concedes. There is no mystery about that." Record 621.

In this Court, counsel similarly conceded that "[w]e do not dispute the proposition that Chiarella *violated his duty as an agent of the offeror corporations not to use their confidential information for personal profit.*" Reply Brief for Petitioner 4 (emphasis added). See Restatement (Second) of Agency § 395 (1958). These statements are tantamount to a formal stipulation that Chiarella's informational advantage was unlawfully obtained. And it is established law that a stipulation related to an essential element of a crime must be regarded by the jury as a fact conclusively proved. See 8 J. Wigmore, Evidence § 2590 (McNaughton rev. 1961); *United States* v. *Houston*, 547 F. 2d 104 (CA9 1976).

In sum, the evidence shows beyond all doubt that Chiarella, working literally in the shadows of the warning signs in the printshop, misappropriated—stole to put it bluntly—valuable nonpublic information entrusted to him in the utmost confidence. He then exploited his ill-gotten informational advantage by purchasing securities in the market. In my view, such conduct plainly violates § 10 (b) and Rule 10b–5. Accordingly, I would affirm the judgment of the Court of Appeals.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Although I agree with much of what is said in Part I of the dissenting opinion of THE CHIEF JUSTICE, *ante*, p. 239, I write separately because, in my view, it is unnecessary to rest petitioner's conviction on a "misappropriation" theory. The fact that petitioner Chiarella purloined, or, to use THE CHIEF

JUSTICE's word, *ante*, at 245, "stole," information concerning pending tender offers certainly is the most dramatic evidence that petitioner was guilty of fraud. He has conceded that he knew it was wrong, and he and his co-workers in the print-shop were specifically warned by their employer that actions of this kind were improper and forbidden. But I also would find petitioner's conduct fraudulent within the meaning of § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), and the Securities and Exchange Commission's Rule 10b–5, 17 CFR § 240.10b–5 (1979), even if he had obtained the blessing of his employer's principals before embarking on his profiteering scheme. Indeed, I think petitioner's brand of manipulative trading, with or without such approval, lies close to the heart of what the securities laws are intended to prohibit.

The Court continues to pursue a course, charted in certain recent decisions, designed to transform § 10 (b) from an intentionally elastic "catchall" provision to one that catches relatively little of the misbehavior that all too often makes investment in securities a needlessly risky business for the uninitiated investor. See, *e. g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975). Such confinement in this case is now achieved by imposition of a requirement of a "special relationship" akin to fiduciary duty before the statute gives rise to a duty to disclose or to abstain from trading upon material, nonpublic information.[1] The Court admits that this conclusion finds no mandate in the language of the statute or its legislative history. *Ante*, at 226. Yet the Court fails even to attempt a justification of its ruling in terms of the purposes

[1] The Court fails to specify whether the obligations of a special relationship must fall directly upon the person engaging in an allegedly fraudulent transaction, or whether the derivative obligations of "tippees," that lower courts long have recognized, are encompassed by its rule. See *ante*, at 230, n. 12; cf. *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, 423 U. S. 232, 255, n. 29 (1976).

of the securities laws, or to square that ruling with the long-standing but now much abused principle that the federal securities laws are to be construed flexibly rather than with narrow technicality. See *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 12 (1971); *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180, 186 (1963).

I, of course, agree with the Court that a relationship of trust can establish a duty to disclose under § 10 (b) and Rule 10b–5. But I do not agree that a failure to disclose violates the Rule only when the responsibilities of a relationship of that kind have been breached. As applied to this case, the Court's approach unduly minimizes the importance of petitioner's *access* to confidential information that the honest investor, no matter how diligently he tried, could not legally obtain. In doing so, it further advances an interpretation of § 10 (b) and Rule 10b–5 that stops short of their full implications. Although the Court draws support for its position from certain precedent, I find its decision neither fully consistent with developments in the common law of fraud, nor fully in step with administrative and judicial application of Rule 10b–5 to "insider" trading.

The common law of actionable misrepresentation long has treated the possession of "special facts" as a key ingredient in the duty to disclose. See *Strong* v. *Repide*, 213 U. S. 419, 431–433 (1909); 1 F. Harper & F. James, Law of Torts § 7.14 (1956). Traditionally, this factor has been prominent in cases involving confidential or fiduciary relations, where one party's inferiority of knowledge and dependence upon fair treatment is a matter of legal definition, as well as in cases where one party is on notice that the other is "acting under a mistaken belief with respect to a material fact." *Frigitemp Corp.* v. *Financial Dynamics Fund, Inc.*, 524 F. 2d 275, 283 (CA2 1975); see also Restatement of Torts § 551 (1938). Even at common law, however, there has been a trend away from strict adherence to the harsh maxim *caveat emptor* and

toward a more flexible, less formalistic understanding of the duty to disclose. See, *e. g.*, Keeton, Fraud—Concealment and Non-Disclosure, 15 Texas L. Rev. 1, 31 (1936). Steps have been taken toward application of the "special facts" doctrine in a broader array of contexts where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair. See James & Gray, Misrepresentation—Part II, 37 Md. L. Rev. 488, 526–527 (1978); 3 Restatement (Second) of Torts § 551 (e), Comment *l* (1977); *id.*, at 166–167 (Tent. Draft No. 10, 1964). See also *Lingsch* v. *Savage*, 213 Cal. App. 2d 729, 735–737, 29 Cal. Rptr. 201, 204–206 (1963); *Jenkins* v. *McCormick*, 184 Kan. 842, 844–845, 339 P. 2d 8, 11 (1959); *Jones* v. *Arnold*, 359 Mo. 161, 169–170, 221 S. W. 2d 187, 193–194 (1949); *Simmons* v. *Evans*, 185 Tenn. 282, 285–287, 206 S. W. 2d 295, 296–297 (1947).

By its narrow construction of § 10 (b) and Rule 10b–5, the Court places the federal securities laws in the rearguard of this movement, a position opposite to the expectations of Congress at the time the securities laws were enacted. Cf. H. R. Rep. No. 1383, 73d Cong., 2d Sess., 5 (1934). I cannot agree that the statute and Rule are so limited. The Court has observed that the securities laws were not intended to replicate the law of fiduciary relations. *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 474–476 (1977). Rather, their purpose is to ensure the fair and honest functioning of impersonal national securities markets where common-law protections have proved inadequate. Cf. *United States* v. *Naftalin*, 441 U. S. 768, 775 (1979). As Congress itself has recognized, it is integral to this purpose "to assure that dealing in securities is fair and without undue preferences or advantages among investors." H. R. Conf. Rep. No. 94–229, p. 91 (1975).

Indeed, the importance of access to "special facts" has been a recurrent theme in administrative and judicial application

of Rule 10b–5 to insider trading. Both the SEC and the courts have stressed the insider's misuse of secret knowledge as the gravamen of illegal conduct. The Court, I think, unduly minimizes this aspect of prior decisions.

*Cady, Roberts & Co.*, 40 S. E. C. 907 (1961), which the Court discusses at some length, provides an illustration. In that case, the Commission defined the category of "insiders" subject to a disclose-or-abstain obligation according to two factors:

> "[F]irst, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing." *Id.*, at 912 (footnote omitted).

The Commission, thus, regarded the insider "relationship" primarily in terms of *access* to nonpublic information, and not merely in terms of the presence of a common-law fiduciary duty or the like. This approach was deemed to be in keeping with the principle that "the broad language of the anti-fraud provisions" should not be "circumscribed by fine distinctions and rigid classifications," such as those that prevailed under the common law. *Ibid.* The duty to abstain or disclose arose, not merely as an incident of fiduciary responsibility, but as a result of the "inherent unfairness" of turning secret information to account for personal profit. This understanding of Rule 10b–5 was reinforced when *Investors Management Co.*, 44 S. E. C. 633, 643 (1971), specifically rejected the contention that a "special relationship" between the alleged violator and an "insider" source was a necessary requirement for liability.

A similar approach has been followed by the courts. In *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 848 (CA2

1968) (en banc), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969), the court specifically mentioned the common-law "special facts" doctrine as one source for Rule 10b–5, and it reasoned that the Rule is "based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information." See also *Lewelling* v. *First California Co.*, 564 F. 2d 1277, 1280 (CA9 1977); *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 829 (Del. 1951). In addition, cases such as *Myzel* v. *Fields*, 386 F. 2d 718, 739 (CA8 1967), cert. denied, 390 U. S. 951 (1968), and *A. T. Brod & Co.* v. *Perlow*, 375 F. 2d 393, 397 (CA2 1967), have stressed that § 10 (b) and Rule 10b–5 apply to any kind of fraud by any person. The concept of the "insider" itself has been flexible; wherever confidential information has been abused, prophylaxis has followed. See, *e. g.*, *Zweig* v. *Hearst Corp.*, 594 F. 2d 1261 (CA9 1979) (financial columnist); *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F. 2d 228 (CA2 1974) (institutional investor); *SEC* v. *Shapiro*, 494 F. 2d 1301 (CA2 1974) (merger negotiator); *Chasins* v. *Smith, Barney & Co.*, 438 F. 2d 1167 (CA2 1970) (market maker). See generally 2 A. Bromberg & L. Lowenfels, Securities Law & Commodities Fraud § 7.4 (6)(b) (1979).

I believe, and surely thought, that this broad understanding of the duty to disclose under Rule 10b–5 was recognized and approved in *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972). That case held that bank agents dealing in the stock of a Ute Indian development corporation had a duty to reveal to mixed-blood Indian customers that their shares could bring a higher price on a non-Indian market of which the sellers were unaware. *Id.*, at 150–153. The Court recognized that "by repeated use of the word 'any,'" the statute and Rule "are obviously meant to be inclusive." *Id.*, at 151. Although it found a relationship of trust between

the agents and the Indian sellers, the Court also clearly established that the bank and its agents were subject to the strictures of Rule 10b–5 because of their strategic position in the marketplace. The Indian sellers had no knowledge of the non-Indian market. The bank agents, in contrast, had intimate familiarity with the non-Indian market, which they had promoted actively, and from which they and their bank both profited. In these circumstances, the Court held that the bank and its agents "possessed the affirmative duty under the Rule" to disclose market information to the Indian sellers, and that the latter "had the right to know" that their shares would sell for a higher price in another market. *Id.*, at 153.

It seems to me that the Court, *ante*, at 229–230, gives *Affiliated Ute Citizens* an unduly narrow interpretation. As I now read my opinion there for the Court, it lends strong support to the principle that a structural disparity in access to material information is a critical factor under Rule 10b–5 in establishing a duty either to disclose the information or to abstain from trading. Given the factual posture of the case, it was unnecessary to resolve the question whether such a structural disparity could sustain a duty to disclose even absent "a relationship of trust and confidence between parties to a transaction." *Ante*, at 230. Nevertheless, I think the rationale of *Affiliated Ute Citizens* definitely points toward an affirmative answer to that question. Although I am not sure I fully accept the "market insider" category created by the Court of Appeals, I would hold that persons having access to confidential material information that is not legally available to others generally are prohibited by Rule 10b–5 from engaging in schemes to exploit their structural informational advantage through trading in affected securities. To hold otherwise, it seems to me, is to tolerate a wide range of manipulative and deceitful behavior. See *Blyth & Co.*, 43 S. E. C. 1037 (1969); *Herbert L. Honohan*, 13 S. E. C. 754 (1943); see generally Brudney, Insiders, Outsiders, and Informational Advantages

under the Federal Securities Laws, 93 Harv. L. Rev. 322 (1979).[2]

Whatever the outer limits of the Rule, petitioner Chiarella's case fits neatly near the center of its analytical framework. He occupied a relationship to the takeover companies giving him intimate access to concededly material information that was sedulously guarded from public access. The information, in the words of *Cady, Roberts & Co.*, 40 S. E. C., at 912, was "intended to be available only for a corporate purpose and not for the personal benefit of anyone." Petitioner, moreover, knew that the information was unavailable to those with whom he dealt. And he took full, virtually riskless advantage of this artificial information gap by selling the stocks shortly after each takeover bid was announced. By any reasonable definition, his trading was "inherent[ly] unfai[r]." *Ibid.* This misuse of confidential information was clearly placed before the jury. Petitioner's conviction, therefore, should be upheld, and I dissent from the Court's upsetting that conviction.

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[2] The Court observes that several provisions of the federal securities laws limit but do not prohibit trading by certain investors who may possess nonpublic market information. *Ante*, at 233–234. It also asserts that "neither the Congress nor the Commission ever has adopted a parity-of-information rule." *Ante*, at 233. In my judgment, neither the observation nor the assertion undermines the interpretation of Rule 10b–5 that I support and that I have endeavored briefly to outline. The statutory provisions cited by the Court betoken a congressional purpose not to leave the exploitation of structural informational advantages unregulated. Letting Rule 10b–5 operate as a "catchall" to ensure that these narrow exceptions granted by Congress are not expanded by circumvention completes this statutory scheme. Furthermore, there is a significant conceptual distinction between parity of information and parity of *access* to material information. The latter gives free rein to certain kinds of informational advantages that the former might foreclose, such as those that result from differences in diligence or acumen. Indeed, by limiting opportunities for profit from manipulation of confidential connections or resort to stealth, equal access helps to ensure that advantages obtained by honest means reap their full reward.

## UNITED STATES *v.* CLARKE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1693. Argued January 15, 16, 1980—Decided March 18, 1980

*Held:* Title 25 U. S. C. § 357, which provides that lands allotted in severalty to Indians may be "condemned" for any public purpose under the laws of the State or Territory where located, does not authorize a state or local government to "condemn" allotted Indian trust lands by physical occupation. Under the "plain meaning" canon of statutory construction, the term "condemned" in § 357 refers to a formal condemnation proceeding instituted by the condemning authority for the purpose of acquiring title to private property and paying just compensation for it, not to an "inverse condemnation" action by a landowner to recover compensation for a taking by physical intrusion. Thus, the Court of Appeals erred in holding that § 357 permitted acquisition of allotted lands by inverse condemnation by certain cities in Alaska, even though Alaska law might allow the exercise of the power of eminent domain through inverse condemnation. Pp. 254-259.

590 F. 2d 765, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 259.

*Harlon L. Dalton* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Dirk Snel,* and *Carl Strass. Robert S. Pelcyger* argued the cause for Bertha Mae Tabbytite, respondent under this Court's Rule 21 (4), in support of the United States. With him on the briefs was *Vincent Vitale.*

*Richard Arthur Weinig* argued the cause and filed a brief for respondents.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted the petition for certiorari of the United States in this case, 444 U. S. 822, to decide the question "[w]hether 25 U. S. C. [§] 357 authorizes a state or local government to 'condemn' allotted Indian trust lands by physical occupation." Pet. for Cert. 2. That statute, in turn, provides in pertinent part:

> "[L]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." 31 Stat. 1084.

We think this is a case in which the meaning of a statute may be determined by the admittedly old-fashioned but nonetheless still entirely appropriate "plain meaning" canon of statutory construction. We further believe that the word "condemned," at least as it was commonly used in 1901, when 25 U. S. C. § 357 was enacted, had reference to a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it.

Both the factual and legal background of the case are complicated, but these complications lose their significance under our interpretation of § 357. For it is conceded that neither the city of Glen Alps nor the city of Anchorage, both Alaska municipal corporations, ever brought an action to condemn the lands here in question in federal court as required by *Minnesota* v. *United States*, 305 U. S. 382 (1939). And since we hold that only in such a formal judicial proceeding may lands such as this be acquired, the complex factual and legal history of the dispute between the Government, respondents Glen M. Clarke et al., and respondent Bertha Mae Tabbytite need not be recited in detail.[1]

[1] Respondent Tabbytite lost in the Court of Appeals for the Ninth Circuit and did not petition for certiorari from that decision. She is there-

The Court of Appeals for the Ninth Circuit held that § 357 permits acquisition of allotted lands by what has come to be known as "inverse condemnation." 590 F. 2d 765 (1979). In so holding, the court reasoned that "once the taking has been accomplished by the state it serves little purpose to interpret the statute to refuse to permit an inverse condemnation suit to be maintained on the groun[d] that the state should have filed an eminent domain action prior to the taking." *Id.*, at 767. We disagree with the Court of Appeals and accordingly reverse the judgment.

There are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding. Although a landowner's action to recover just compensation for a taking by physical intrusion has come to be referred to as "inverse" or "reverse" condemnation, the simple terms "condemn" and "condemnation" are not commonly used to describe such an action. Rather, a "condemnation" proceeding is commonly understood to be an action brought *by* a condemning authority such as the Government in the exercise of its power of eminent domain. In *United States* v. *Lynah*, 188 U. S. 445 (1903), for example, which held that the Federal Government's permanent flooding of the plaintiff's land constituted a compensable "taking" under the Fifth Amendment, this Court consistently made separate reference to condemnation proceedings and to the landowner's cause of action to recover damages for the taking. *Id.*, at 462, 467, 468.[2]

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fore a respondent in this Court. This Court's Rule 21 (4). Her counsel has filed both a brief and reply brief adopting the statements of the case and the arguments set forth in the brief for the United States, but principally devoted to "matters not included in the Brief of the United States." Since we agree with the position advanced by the United States, we need not decide whether Tabbytite's arguments comply with this Court's Rule 40 (1) (d) (2). See also Rule 40 (3).

[2] The landowner's right to sue for damages was based on the theory that if a landowner were entitled to have governmental agents enjoined from taking his land without implementing condemnation proceedings, he also was entitled to waive that right and to demand just compensation as if the

More recent decisions of this Court reaffirm this well-established distinction between condemnation actions and physical takings by governmental bodies that may entitle a landowner to sue for compensation. Thus, in *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275, 291 (1958), when discussing the acquisition by the Government of property rights necessary to carry out a reclamation project, this Court stated that such rights must be acquired by "paying just compensation therefor, either through condemnation or, if already taken, through action of the owners in the courts." And in *United States* v. *Dickinson*, 331 U. S. 745, 749 (1947), this Court referred to the Government's choice "not to condemn land but to bring about a taking by a continuous process of physical events." See also *id.*, at 747–748; *Dugan* v. *Rank*, 372 U. S. 609, 619 (1963).[3]

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Government had taken his property under its sovereign right of eminent domain. 188 U. S., at 462. See also, *e. g.*, *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 656 (1884). Cf. *United States* v. *Lee*, 106 U. S. 196 (1882) (holding that landowner could bring suit for ejectment against federal officials who took possession of land without bringing condemnation proceedings); *Winslow* v. *Baltimore & Ohio R. Co.*, 188 U. S. 646, 660–661 (1903) (after declining to treat a suit for damages by a landowner as a condemnation action, the Court directed the lower court to enjoin temporarily proceedings brought by the landowner to dispossess the railroad company from the land "in order to enable [the railroad company] to condemn such land in proper proceedings for that purpose, which cannot be taken in the present suit").

[3] Also, in *United States* v. *Dow*, 357 U. S. 17, 21 (1958), this Court stated:

"Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act, 28 U. S. C. §§ 1346 (a)(2) and 1491, to recover just compensation. See *Hurley* v. *Kincaid*, 285 U. S. 95, 104. Under the second procedure the Government may either employ statutes

The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. As defined by one land use planning expert, "[i]nverse condemnation is *'a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" D. Hagman, Urban Planning and Land Development Control Law 328 (1971) (emphasis added). A landowner is entitled to bring such an action as a result of "the self-executing character of the constitutional provision with respect to compensation. . . ." See 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972). A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title. The phrase "inverse condemnation," as a common understanding of that phrase would suggest, simply describes an action that is the "inverse" or "reverse" of a condemnation proceeding.

There are also important practical differences between condemnation proceedings and actions by landowners to recover compensation for "inverse condemnation." Condemnation proceedings, depending on the applicable statute, require various affirmative action on the part of the condemning authority. To accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question. Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation. And in the case of Indian trust

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which require it to pay over the judicially determined compensation before it can enter upon the land, . . . or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained."

lands, which present the Government " 'with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments,' " *Poafpybitty* v. *Skelly Oil Co.*, 390 U. S. 365, 374 (1968), the United States may be placed at a significant disadvantage by this shifting of the initiative from the condemning authority to the condemnee.

Likewise, the choice of the condemning authority to take property by physical invasion rather than by a formal condemnation action may also have important monetary consequences. The value of property taken by a governmental body is to be ascertained as of the date of taking. *United States* v. *Miller*, 317 U. S. 369, 374 (1943). In a condemnation proceeding, the taking generally occurs sometime during the course of the proceeding, and thus compensation is based on a relatively current valuation of the land. See 1 L. Orgel, Valuation in Eminent Domain § 21, n. 29 (2d ed. 1953). When a taking occurs by physical invasion, on the other hand, the usual rule is that the time of the invasion constitutes the act of taking, and "[i]t is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued. . . ." *United States* v. *Dow*, 357 U. S. 17, 22 (1958).

Thus, even assuming that the term "inverse condemnation" were in use in 1901 to the same extent as it is today, there are sufficient legal and practical differences between "condemnation" and "inverse condemnation" to convince us that when § 357 authorizes the condemnation of lands pursuant to the laws of a State or Territory, the term "condemned" refers not to an action by a landowner to recover compensation for a taking, but to a formal condemnation proceeding instituted by the condemning authority.[4]

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[4] The legislative history of § 357 does not provide any meaningful guidance as to the meaning of "condemned." The language eventually adopted as § 357 was not part of the original bill. It was inserted, without com-

Respondent municipality of Anchorage argues that the action authorized by the Court of Appeals here should be regarded as one in condemnation because Alaska law allows the "exercise of the power of eminent domain through inverse condemnation or a taking in the nature of inverse condemnation." Brief for Respondent Municipality of Anchorage 16. But we do not reach questions of Alaska law here because 25 U. S. C. § 357, although prescribing that allotted lands "may be condemned for any public purpose under the laws of the State or Territory where located," requires that they nonetheless be "condemned." It is conceded that there has never been a formal condemnation action instituted in this case. Since we construe such an action to be an indispensable prerequisite for the reliance of any State or Territory on the other provisions of this section, we therefore reverse the judgment of the Court of Appeals.

*Reversed.*

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE joins, dissenting.

Since the Court's opinion sets forth none of the facts of this case, it may be well to mention at least a few.

Bertha Mae Tabbytite, an American Indian, in 1954 settled on a 160-acre plot in the Chugach Mountains southeast of Anchorage, Alaska. She initially sought to perfect her claim to the land under the homestead laws and thereby to obtain an unrestricted fee title. Her applications for this were unsuccessful, however, and in 1966 Tabbytite agreed to accept a restricted trust patent to the land as an Indian allottee. As a result, the legal title remains in the United States, and

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ment or discussion, on the Senate floor. 34 Cong. Rec. 1448 (1901). And the House Report only briefly discussed § 3 of the Act, to which § 357 was added. It stated: "Fifth. Providing for the opening of highways through like lands under State and Territorial laws and upon the payment of compensation." H. R. Rep. No. 2064, 56th Cong., 2d Sess., 3 (1900).

Tabbytite's powers of alienation are restricted. See 25 U. S. C. § 348.

Meanwhile, in 1958 Glen Clarke and his wife applied for a homestead patent on 80 acres adjoining the Tabbytite allotment. Two months later, without obtaining an easement, they constructed a road across that land. The Clarkes repeatedly contested Tabbytite's homestead application and prevented her from perfecting her patent. After securing their own patent in 1961, the Clarkes subdivided their property into 40 parcels, most of which were sold to others before this litigation began. That subdivision and surrounding lands were incorporated in June 1961 as a third-class city called Glen Alps. As a third-class city under Alaska law, Glen Alps did not possess the power of eminent domain.

In 1969, the United States filed the present action for damages and to enjoin the use of the road across the Tabbytite allotment. The District Court awarded damages for trespass but denied the injunction. The court concluded that the road was a "way of necessity," and that closing the road would cause "hardship" to the defendants. On the initial appeal to the United States Court of Appeals for the Ninth Circuit, that court reversed and did so on the grounds that upon entry in 1954 Tabbytite's title to the land was good against everyone except the United States Government, and that the Clarkes were not successors in interest to an easement implicitly retained by the Government. 529 F. 2d 984 (1976).

That ruling, however, was not the end of the case. In September 1975, the municipality of Anchorage annexed Glen Alps and apparently took over maintenance of the roadway. On the remand to the District Court, the municipality entered the proceedings and opposed an injunction on the ground that it already had effectively exercised its power of eminent domain by "inverse condemnation." The United States took the position that the federal statute consenting to condemnation of allotted lands, 25 U. S. C. § 357, does not authorize

inverse condemnation. The District Court ruled that under the federal statute, state law determines the propriety of condemnation proceedings and that Alaska law, indeed, recognized "inverse condemnation." The court held, accordingly, that Tabbytite was entitled to just compensation, but that an injunction should not issue.

On appeal, the Ninth Circuit affirmed and remanded the case for further proceedings. 590 F. 2d 765 (1979). It agreed with the District Court that § 357 permits a State to take Indian land by paying compensation in an inverse condemnation action. It reasoned that "once the taking has been accomplished by the state it serves little purpose to interpret the statute to refuse to permit an inverse condemnation suit to be maintained on the grounds that the state should have filed an eminent domain action prior to the taking." 590 F. 2d, at 767. It observed that "it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights." It predicted that its holding would encourage States and political subdivisions to act "with more circumspection, not less, when governmental activities conflict with ownership rights of Indian trust lands." *Ibid.*

I find the opinion of the Ninth Circuit persuasive. The present case is not a dispute about a right but about a remedy. There is, of course, no question that if § 357 applies, Anchorage has the right to take Tabbytite's property through traditional eminent domain proceedings, and that Tabbytite has a right to just compensation if it does so. The case centers, however, in the fact that the municipality already has taken an interest in the property without a formal proceeding; the issue, then, is whether an after-the-fact award of just compensation is an adequate remedy. The dispute is in the measure of damages.

There is no question that inverse condemnation is recognized by Alaska law in circumstances similar to the present case. *State of Alaska, Dept. of Highways* v. *Crosby,* 410 P.

2d 724 (Alaska 1966); *City of Anchorage* v. *Nesbett*, 530 P. 2d 1324 (Alaska 1975).* As I read § 357, it does not prohibit resort to inverse condemnation under state law. The statute explicitly refers to state law, and I read in the statute no specialized definition of the term "condemned" as a matter of federal law.

The United States and Tabbytite perhaps are concerned that in an action for inverse condemnation, the property interest will be valued at the earlier date of the entry rather than at the subsequent date of the institution of formal condemnation proceedings. The inference, of course, is that the property interest will have appreciated in value in the interim, to the advantage of the Indian allottee. I suspect that this argument has more form than substance. Interest during the intervening period will make up much of the difference. And still more of that difference might well be the result of the improvement for which eminent domain is belatedly invoked. There is perhaps little reason to doubt, in this very case, that the Tabbytite property is more valuable because it is crossed by a graded, improved, and publicly maintained road.

For these reasons, I would affirm the judgment of the Court of Appeals, and I respectfully dissent from the Court's reversal of that judgment.

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*It is not clear that Alaska law would permit deliberate resort to inverse condemnation as a means of avoiding initiation of formal condemnation proceedings. That issue is not before us, since Anchorage first assumed responsibility for the road under a claim of right under the first judgment of the District Court.

# RUMMEL *v.* ESTELLE, CORRECTIONS DIRECTOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-6386. Argued January 7, 1980—Decided March 18, 1980

Petitioner, who previously on two separate occasions had been convicted in Texas state courts and sentenced to prison for felonies (fraudulent use of a credit card to obtain $80 worth of goods or services, and passing a forged check in the amount of $28.36), was convicted of a third felony, obtaining $120.75 by false pretenses, and received a mandatory life sentence pursuant to Texas' recidivist statute. After the Texas appellate courts had rejected his direct appeal as well as his subsequent collateral attacks on his imprisonment, petitioner sought a writ of habeas corpus in Federal District Court, claiming that his life sentence was so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The District Court rejected this claim, and the Court of Appeals affirmed, attaching particular importance to the probability that petitioner would be eligible for parole within 12 years of his initial confinement.

*Held:* The mandatory life sentence imposed upon petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. Pp. 268-285.

(a) Texas' interest here is not simply that of making criminal the unlawful acquisition of another person's property, but is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are incapable of conforming to the norms of society as established by its criminal law. The Texas recidivist statute thus is nothing more than a societal decision that when a person, such as petitioner, commits yet another felony, he should be subjected to the serious penalty of life imprisonment, subject only to the State's judgment as to whether to grant him parole. Pp. 276-278.

(b) While petitioner's inability to enforce any "right" to parole precludes treating his life sentence as equivalent to a 12 years' sentence, nevertheless, because parole is an established variation on imprisonment, a proper assessment of Texas' treatment of petitioner could not ignore the possibility that he will not actually be imprisoned for the rest of his life. Pp. 280-281.

(c) Texas is entitled to make its own judgment as to the line dividing felony theft from petty larceny, subject only to those strictures of the Eighth Amendment that can be informed by objective factors. Moreover, given petitioner's record, Texas was not required to treat him in the same manner as it might treat him were this his first "petty property offense." Pp. 284–285.

587 F. 2d 651, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 285. POWELL, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 285.

*Scott J. Atlas*, by appointment of the Court, 442 U. S. 939, argued the cause for petitioner. With him on the briefs was *Charles Alan Wright*.

*Douglas M. Becker*, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Ted L. Hartley*, Executive Assistant Attorney General, *Gilbert J. Pena*, Assistant Attorney General, and *W. Barton Boling*.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner William James Rummel is presently serving a life sentence imposed by the State of Texas in 1973 under its "recidivist statute," formerly Art. 63 of its Penal Code, which provided that "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."[1] On January

*Briefs of *amici curiae* urging affirmance were filed by *Keith W. Burris* for the Criminal District Attorney of Bexar County, Texas; and by *Michael Kuhn* for the District Attorney of Harris County, Texas.

[1] With minor revisions, this article has since been recodified as Texas Penal Code Ann. § 12.42 (d) (1974).

19, 1976, Rummel sought a writ of habeas corpus in the United States District Court for the Western District of Texas, arguing that life imprisonment was "grossly disproportionate" to the three felonies that formed the predicate for his sentence and that therefore the sentence violated the ban on cruel and unusual punishments of the Eighth and Fourteenth Amendments. The District Court and the United States Court of Appeals for the Fifth Circuit rejected Rummel's claim, finding no unconstitutional disproportionality. We granted certiorari, 441 U. S. 960, and now affirm.

## I

In 1964 the State of Texas charged Rummel with fraudulent use of a credit card to obtain $80 worth of goods or services.[2] Because the amount in question was greater than $50, the charged offense was a felony punishable by a minimum of 2 years and a maximum of 10 years in the Texas Department of Corrections.[3] Rummel eventually pleaded guilty to the charge and was sentenced to three years' confinement in a state penitentiary.

In 1969 the State of Texas charged Rummel with passing a forged check in the amount of $28.36, a crime punishable by imprisonment in a penitentiary for not less than two nor more

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[2] In 1964 Texas Penal Code Ann., Art. 1555b, provided:

"Section 1. It shall be unlawful for any person to present a credit card or alleged credit card, with the intent to defraud, to obtain or attempt to obtain any item of value or service of any type; or to present such credit card or alleged credit card, with the intent to defraud, to pay for items of value or services rendered." App. to Tex. Penal Code Ann., p. 712 (1974).

[3] In 1964 Texas Penal Code Ann., Art. 1555b (4)(d), provided:

"For a violation of this Act, in the event the amount of the credit obtained or the value of the items or services is Fifty Dollars ($50) or more, punishment shall be confinement in the penitentiary for not less than two (2) nor more than ten (10) years." App. to Tex. Penal Code Ann., p. 713 (1974).

than five years.[4] Rummel pleaded guilty to this offense and was sentenced to four years' imprisonment.

In 1973 Rummel was charged with obtaining $120.75 by false pretenses.[5] Because the amount obtained was greater than $50, the charged offense was designated "felony theft," which, by itself, was punishable by confinement in a penitentiary for not less than 2 nor more than 10 years.[6] The prosecution chose, however, to proceed against Rummel under Texas' recidivist statute, and cited in the indictment his 1964 and 1969 convictions as requiring imposition of a life sentence if Rummel were convicted of the charged offense. A jury convicted Rummel of felony theft and also found as true the allegation that he had been convicted of two prior felonies. As a result, on April 26, 1973, the trial court imposed upon Rummel the life sentence mandated by Art. 63.

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[4] In 1969 Texas Penal Code Ann., Art. 996, provided:

"If any person shall knowingly pass as true, or attempt to pass as true, any such forged instrument in writing as is mentioned and defined in the preceding articles of this chapter, he shall be confined in the penitentiary not less than two nor more than five years." App. to Tex. Penal Code Ann., p. 597 (1974).

[5] In 1973 Texas Penal Code Ann., Art. 1410, provided:

" 'Theft' is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking." App. to Tex. Penal Code Ann., p. 688 (1974).

In 1973 Texas Penal Code Ann., Art. 1413, provided:

"The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete." App. to Tex. Penal Code Ann., p. 689 (1974).

[6] In 1973 Texas Penal Code § 1421 provided:

"Theft of property of the value of fifty dollars or over shall be punished by confinement in the penitentiary not less than two nor more than ten years." App. to Tex. Penal Code Ann., p. 690 (1974).

The Texas appellate courts rejected Rummel's direct appeal as well as his subsequent collateral attacks on his imprisonment.[7] Rummel then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Texas. In that petition, he claimed, *inter alia*, that his life sentence was so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment. The District Court rejected this claim, first noting that this Court had already rejected a constitutional attack upon Art. 63, see *Spencer* v. *Texas*, 385 U. S. 554 (1967), and then crediting an argument by respondent that Rummel's sentence could not be viewed as life imprisonment because he would be eligible for parole in approximately 12 years.

A divided panel of the Court of Appeals reversed. 568 F. 2d 1193 (CA5 1978). The majority relied upon this Court's decision in *Weems* v. *United States*, 217 U. S. 349 (1910), and a decision of the United States Court of Appeals for the Fourth Circuit, *Hart* v. *Coiner*, 483 F. 2d 136 (1973), cert. denied, 415 U. S. 983 (1974), in holding that Rummel's life sentence was "so grossly disproportionate" to his offenses as to constitute cruel and unusual punishment. 568 F. 2d, at 1200. The dissenting judge argued that "[n]o neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed." *Id.*, at 1201–1202.

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[7] Preliminarily, the respondent argues that Rummel's claim is barred by *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), because he did not object at the punishment stage of his trial to the imposition of a mandatory life sentence. Respondent raised this claim for the first time in his petition to the Court of Appeals for rehearing en banc, which was filed shortly after *Wainwright* was decided. The Court of Appeals rejected this argument because it did not believe that Texas' contemporaneous-objection requirement extended to a challenge like that raised by Rummell. See 587 F. 2d 651, 653–654 (CA5 1978). Deferring to the Court of Appeals' interpretation of Texas law, we decline to hold that *Wainwright* bars Rummel from presenting his claim.

Rummel's case was reheard by the Court of Appeals sitting en banc. That court vacated the panel opinion and affirmed the District Court's denial of habeas corpus relief on Rummel's Eighth Amendment claim. 587 F. 2d 651 (CA5 1978). Of particular importance to the majority of the Court of Appeals en banc was the probability that Rummel would be eligible for parole within 12 years of his initial confinement. Six members of the Court of Appeals dissented, arguing that Rummel had no enforceable right to parole and that *Weems* and *Hart* compelled a finding that Rummel's life sentence was unconstitutional.

## II

Initially, we believe it important to set forth two propositions that Rummel does not contest. First, Rummel does not challenge the constitutionality of Texas' recidivist statute as a general proposition. In *Spencer* v. *Texas, supra,* this Court upheld the very statute employed here, noting in the course of its opinion that similar statutes had been sustained against contentions that they violated "constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." 385 U. S., at 560. Here, Rummel attacks only the result of applying this concededly valid statute to the facts of his case.

Second, Rummel does not challenge Texas' authority to punish each of his offenses as felonies, that is, by imprisoning him in a state penitentiary.[8] Cf. *Robinson* v. *California,* 370 U. S. 660 (1962) (statute making it a crime to be addicted to the use of narcotics violates the Eighth and Fourteenth Amendments). See also *Ingraham* v. *Wright,* 430 U. S. 651,

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[8] Texas, like most States, defines felonies as offenses that "may—not must—be punishable by death or by confinement in the penitentiary. . . ." Tex. Penal Code Ann., Art. 47 (Vernon 1925), recodified without substantive change at Tex. Penal Code Ann. § 1.07 (14) (1974). See also W. LaFave & A. Scott, Handbook on Criminal Law 26 (1972).

667 (1977) (Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such . . ."). Under Texas law Rummel concededly could have received sentences totaling 25 years in prison for what he refers to as his "petty property offenses." Indeed, when Rummel obtained $120.75 by false pretenses he committed a crime punishable as a felony in at least 35 States and the District of Columbia.[9] Similarly, a large number of States authorized

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[9] See Ala. Code §§ 13-3-50, 13-3-90 (1975) (1 to 10 years); Alaska Stat. Ann. § 11.20.360 (1970) (1 to 5 years); Ariz. Rev. Stat. Ann. §§ 13-661 (A)(3), 13-663 (A)(1), 13-671 (1956 and Supp. 1957-1978) (1 to 10 years); Ark. Stat. Ann. §§ 41-1901, 41-3907 (1964) (1 to 21 years); Colo. Rev. Stat. §§ 18-4-401, 18-1-105 (1973) (fine or up to 10 years); Del. Code Ann., Tit. 11, §§ 841, 843, 4205 (1974) (fine or up to 7 years); D. C. Code § 22-1301 (1973) (1 to 3 years); Fla. Stat. § 811.021 (1965) (fine or up to 5 years); Ga. Code Ann. §§ 26-1803, 26-1812 (1977) (fine or up to 10 years); Ind. Code Ann. §§ 10-3030 (b), 10-3039 (3) (Supp. 1975) (fine or up to 10 years); Kan. Stat. Ann. §§ 21-3701, 21-4501 (1974) (1 to 3 years); Ky. Rev. Stat. §§ 514.040, 532.080 (1975) (1 to 5 years); La. Rev. Stat. Ann. § 14:67 (West 1974) (up to 2 years); Me. Rev. Stat. Ann., Tit. 17, § 1601 (1965) (fine or up to 7 years); Md. Ann. Code, Art. 27, § 140 (1957) (fine or up to 10 years); Mass. Gen. Laws Ann., ch. 266, § 30 (West 1970) (fine or up to 5 years); Mich. Comp. Laws § 750.218 (1968) (fine or up to 10 years); Minn. Stat. § 609.52 (Supp. 1978) (fine or up to 5 years); Miss. Code Ann. § 97-19-39 (1972) (fine or up to 3 years); Mont. Rev. Code Ann. §§ 94-2701 (1), 94-2704 (1), 94-2706 (1947) (1 to 14 years); Nev. Rev. Stat. §§ 205.380, 205.380 (1) (1977) (fine or 1 to 10 years); N. H. Rev. Stat. Ann. §§ 637:4 (I), 637:11 (II)(a), 651:2 (1974) (fine or up to 7 years); N. C. Gen. Stat. § 14-100 (1969) (fine or 4 months to 10 years); N. D. Cent. Code §§ 12.1-23-02, 12.1-23-05 (2)(a), 12.1-32-01 (3) (1976) (fine or up to 5 years); Ohio Rev. Code Ann. § 2911.01 (Supp. 1974) (1 to 3 years), committee comment following Ohio Rev. Stat. Ann. § 2913.02 (1975); Okla. Stat., Tit. 21, §§ 1541.1, 1541.2 (Supp. 1979-1980) (fine or 1 to 10 years); S. D. Comp. Laws Ann. §§ 22-37-1, 22-37-2, 22-37-3 (1969) (up to 10 years); Tenn. Code Ann. §§ 39-1901, 39-4203, 39-4204 (1975) (3 to 10 years); Tex. Penal Code Ann., Arts. 1410, 1413, 1421 (Vernon 1925) (2 to 10 years); Utah Code Ann. §§ 76-3-203 (3), 76-6-405, 76-6-412 (1978), and accompanying Compiler's Note (up to 5 years); Vt. Stat. Ann., Tit. 13, § 2002

significant terms of imprisonment for each of Rummel's other offenses at the times he committed them.[10] Rummel's challenge thus focuses only on the State's authority to impose a

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(1958) (up to 10 years); Va. Code §§ 18.2–178, 18.2–95 (1975) (fine or 1 to 20 years); Wash. Rev. Code Ann. §§ 9.54.010 (2), 9.54.090 (6) (1974) (up to 15 years); W. Va. Code §§ 61–3–24, 61–3–13 (1977) (1 to 10 years); Wis. Stat. Ann. § 943.20 (1958) (fine or up to 5 years); Wyo. Stat. § 6–3–106 (1977) (up to 10 years).

[10] In 1969, Rummel's passing of a forged check would have been punishable by imprisonment in 49 States and the District of Columbia, even though the amount in question was only $28.36. See Ala. Code, Tit. 14, §§ 199, 207 (1958) (1 to 20 years); Ariz. Rev. Stat. Ann. § 13–421 (Supp. 1957–1978) (1 to 14 years); Ark. Stat. Ann. § 41–1806 (1964) (2 to 10 years); Cal. Penal Code Ann. §§ 470, 473 (West 1970) (up to 14 years); Colo. Rev. Stat. § 40–6–1 (1963) (1 to 14 years); Conn. Gen. Stat. § 53–346 (1968) (up to 5 years); Del. Code Ann., Tit. 11, §§ 861, 4205 (1974) (fine or up to 7 years); D. C. Code § 22–1401 (1973) (1 to 10 years); Fla. Stat. §§ 831.01, 831.02 (1965) (fine or up to 10 years); Ga. Code Ann. § 26–1701 (1977) (1 to 10 years); Haw. Rev. Stat. §§ 743–9, 743–11 (1968) (fine or up to 5 years' hard labor); Idaho Code §§ 18–3601, 18–3604 (1948) (1 to 14 years); Ill. Rev. Stat., ch. 38, § 17–3 (1971) (fine and/or 1 to 14 years); Ind. Code § 10–2102 (1956) (2 to 14 years plus fine); Iowa Code § 718.2 (1950) (fine or up to 10 years); Kan. Stat. Ann. §§ 21–609, 21–631 (1964) (up to 10 years' hard labor); Ky. Rev. Stat. § 434.130 (1962) (2 to 10 years); La. Rev. Stat. Ann. § 14:72 (West 1974) (fine or up to 10 years' hard labor); Me. Rev. Stat. Ann., Tit. 17, § 1501 (1965) (up to 10 years); Md. Ann. Code, Art. 27, § 44 (1957) (1 to 10 years); Mass. Gen. Laws Ann., ch. 267, § 5 (West 1970) (2 to 10 years); Mich. Comp. Laws § 750.253 (1968) (fine or up to 5 years); Minn. Stat. § 609.625 (3) (1964) (fine or up to 10 years); Miss. Code Ann. §§ 2172, 2187 (1942) (2 to 15 years); Mo. Rev. Stat. § 561.011 (1969) (fine or up to 10 years); Mont. Rev. Code Ann. §§ 94–2001, 94–2044 (1947) (1 to 14 years); Neb. Rev. Stat. § 28–601 (1943) (1 to 20 years plus fine); Nev. Rev. Stat. § 205.090 (1959) (1 to 14 years); N. H. Rev. Stat. Ann. §§ 581:1, 581:2 (1955) (up to 7 years); N. J. Stat. Ann. §§ 2A:109–1, 2A:85–6 (West 1969) (fine or up to 7 years); N. M. Stat. Ann. §§ 40A–16–9, 40A–29–3 (C) (Supp. 1963) (fine or 2 to 10 years); N. Y. Penal Law §§ 70.00 (2) (d), 170.10, 170.25 (McKinney 1967 and 1975) (up to 7 years); N. C. Gen. Stat. § 14–120 (1969) (4 months to 10 years); N. D. Cent. Code §§ 12–39–23, 12–39–27 (1960) (up to 10

sentence of life imprisonment, as opposed to a substantial term of years, for his third felony.

This Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime. See, *e. g.*, *Weems* v.

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years); Ohio Rev. Code Ann. § 2913.01 (1954) (1 to 20 years); Okla. Stat., Tit. 21, §§ 1577, 1621 (2) (1958) (up to 7 years); Ore. Rev. Stat. §§ 165.105, 165.115 (Supp. 1967) (up to 10 years); Pa. Stat. Ann., Tit. 18, § 5014 (Purdon 1963) (fine or up to 10 years); R. I. Gen. Laws § 11–17–1 (1956) (fine or up to 10 years); S. C. Code § 16–13–10 (1976) (1 to 7 years plus fine); S. D. Comp. Laws Ann. §§ 22–39–14, 22–39–17 (1967) (fine or up to 5 years); Tenn. Code Ann. §§ 39–1704, 39–1721, 39–4203, 39–4204 (1955 and Supp. 1974) (1 to 5 years); Tex. Penal Code Ann., Art. 996 (Vernon 1925) (2 to 5 years); Utah Code Ann. §§ 76–26–1, 76–26–4 (1953) (1 to 20 years); Vt. Stat. Ann., Tit. 13, § 1802 (1958) (fine or up to 10 years); Va. Code § 18.1–96 (1960) (up to 10 years); Wash. Rev. Code Ann. §§ 9.44.020, 9.44.060 (1956) (up to 20 years); W. Va. Code § 61–4–5 (1966) (up to 10 years); Wis. Stat. Ann. § 943.38 (1958) (fine or up to 10 years); Wyo. Stat. § 6–2–101 (1977) (up to 14 years).

In 1964, at least five of the States that had specific statutes covering credit-card fraud authorized terms of imprisonment for a crime like Rummel's. See Cal. Penal Code Ann. § 484a (b) (6) (Deering Supp. 1964), § 18 (Deering 1960) (up to 5 years); Kan. Stat. Ann. §§ 21–533, 21–534, 21–590 (1964) (up to 5 years' hard labor); 1963 Ore. Laws, ch. 588, § 3 (6) (up to 5 years); Tex. Penal Code Ann., Art. 1555b (Vernon Supp. 1973) (2 to 10 years); Va. Code § 18.1–119.1 (Supp. 1964) (up to 10 years). A number of other States, while lacking specific statutes dealing with credit-card fraud, apparently authorized an equivalent degree of punishment for such a crime under their general fraud provisions. See, *e. g.*, Ala. Code, Tit. 14, §§ 209, 331 (1958 and Supp. 1973) (1 to 10 years); Mont. Rev. Code Ann. §§ 94–1805, 94–2704 (1), 94–2706 (1947) (1 to 14 years); N. H. Rev. Stat. Ann. § 580:1 (1955) (fine or up to 7 years); N. C. Gen. Stat. § 14–100 (1953) (fine or up to 10 years); N. D. Cent. Code § 12–38–04 (1960) (fine or up to 3 years); Tenn. Code Ann. §§ 39–1901, 39–4203, 39–4204 (1955 and Supp. 1974) (1 to 5 years); Vt. Stat. Ann., Tit. 13, § 2002 (1958) (fine or up to 10 years). After 1964, at least two other States adopted specific statutes dealing with credit-card fraud and authorizing imprisonment for crimes like Rummel's. See Idaho Code §§ 18–112, 18–3113, 18–3119 (1979) (fine or up to 5 years); Wash. Rev. Code Ann. § 9.26A.040 (1972) (up to 20 years).

*United States*, 217 U. S., at 367; *Ingraham* v. *Wright*, 430 U. S., at 667 (dictum); *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion). In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion); *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.); *Furman* v. *Georgia*, 408 U. S. 238, 458 (1972) (POWELL, J., dissenting). Rummel cites these latter opinions dealing with capital punishment as compelling the conclusion that his sentence is disproportionate to his offenses. But as MR. JUSTICE STEWART noted in *Furman:*

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Id.*, at 306.

This theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions. See, *e. g.*, *Furman* v. *Georgia*, *supra*, at 287, 289 (BRENNAN, J., concurring); *Gregg* v. *Georgia*, *supra*, at 187 (opinion of STEWART, POWELL, and STEVENS, JJ.); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976); *Coker* v. *Georgia*, *supra*, at 598 (plurality opinion). Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.

Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare. In *Weems* v. *United States*, *supra*, a case coming to this Court from the Supreme Court of the Philippine

Islands, petitioner successfully attacked the imposition of a punishment known as *"cadena temporal"* for the crime of falsifying a public record. Although the Court in *Weems* invalidated the sentence after weighing "the mischief and the remedy," 217 U. S., at 379, its finding of disproportionality cannot be wrenched from the extreme facts of that case. As for the "mischief," Weems was convicted of falsifying a public document, a crime apparently complete upon the knowing entry of a single item of false information in a public record, "though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it." *Id.*, at 365. The mandatory "remedy" for this offense was *cadena temporal*, a punishment described graphically by the Court:

> "Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the 'authority immediately in charge of his surveillance,' and without permission in writing." *Id.*, at 366.

Although Rummel argues that the length of Weems' imprisonment was, by itself, a basis for the Court's decision, the Court's opinion does not support such a simple conclusion. The opinion consistently referred jointly to the length of imprisonment and its "accessories" or "accompaniments." See *id.*, at 366, 372, 377, 380. Indeed, the Court expressly rejected an argument made on behalf of the United States that "the pro-

vision for imprisonment in the Philippine Code is separable from the accessory punishment, and that the latter may be declared illegal, leaving the former to have application." According to the Court, "[t]he Philippine Code unites the penalties of *cadena temporal*, principal and accessory, and it is not in our power to separate them. . . ." *Id.*, at 382. Thus, we do not believe that *Weems* can be applied without regard to its peculiar facts: the triviality of the charged offense, the impressive length of the minimum term of imprisonment, and the extraordinary nature of the "accessories" included within the punishment of *cadena temporal*.

Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.[11] Only six years after *Weems*, for example, Mr. Justice Holmes wrote for a unanimous Court in brushing aside a proportionality challenge to concurrent sentences of five years' imprisonment and cumulative fines of $1,000 on each of seven counts of mail fraud. See *Badders* v. *United States*, 240 U. S. 391 (1916). According to the Court, there was simply "no ground for declaring the punishment unconstitutional." *Id.*, at 394.

Such reluctance to review legislatively mandated terms of imprisonment is implicit in our more recent decisions as well. As was noted by MR. JUSTICE WHITE, writing for the plurality in *Coker* v. *Georgia*, *supra*, at 592, our Court's "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible ex-

[11] This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, *post*, at 288, if a legislature made overtime parking a felony punishable by life imprisonment.

tent." Since *Coker* involved the imposition of capital punishment for the rape of an adult female, this Court could draw a "bright line" between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction. For the reasons stated by MR. JUSTICE STEWART in *Furman*, see *supra*, at 272, this line was considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years.

Similarly, in *Weems* the Court could differentiate in an objective fashion between the highly unusual *cadena temporal* and more traditional forms of imprisonment imposed under the Anglo-Saxon system. But a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult to square with the view expressed in *Coker* that the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices.

In an attempt to provide us with objective criteria against which we might measure the proportionality of his life sentence, Rummel points to certain characteristics of his offenses that allegedly render them "petty." He cites, for example, the absence of violence in his crimes. But the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal. A high official in a large corporation can commit undeniably serious crimes in the area of antitrust, bribery, or clean air or water standards without coming close to engaging in any "violent" or short-term "life-threatening" behavior. Additionally, Rummel cites the "small" amount of money taken in each of his crimes. But to recognize that the State of Texas could have imprisoned Rummel for life if he had stolen $5,000, $50,000, or $500,000, rather than the $120.75 that a jury convicted him of stealing, is virtually to concede that the lines to be drawn are indeed "subjective," and therefore properly within the province of

legislatures, not courts. Moreover, if Rummel had attempted to defraud his victim of $50,000, but had failed, no money whatsoever would have changed hands; yet Rummel would be no less blameworthy, only less skillful, than if he had succeeded.

In this case, however, we need not decide whether Texas could impose a life sentence upon Rummel merely for obtaining $120.75 by false pretenses. Had Rummel only committed that crime, under the law enacted by the Texas Legislature he could have been imprisoned for no more than 10 years. In fact, at the time that he obtained the $120.75 by false pretenses, he already had committed and had been imprisoned for two other felonies, crimes that Texas and other States felt were serious enough to warrant significant terms of imprisonment even in the absence of prior offenses. Thus the interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law. By conceding the validity of recidivist statutes generally, Rummel himself concedes that the State of Texas, or any other State, has a valid interest in so dealing with that class of persons.

Nearly 70 years ago, and only 2 years after *Weems*, this Court rejected an Eighth Amendment claim that seems factually indistinguishable from that advanced by Rummel in the present case. In *Graham* v. *West Virginia*, 224 U. S. 616 (1912), this Court considered the case of an apparently incorrigible horsethief who was sentenced to life imprisonment under West Virginia's recidivist statute. In 1898 Graham had been convicted of stealing "one bay mare" valued at $50; in 1901 he had been convicted of "feloniously and burglariously" entering a stable in order to steal "one brown horse, named Harry, of the value of $100"; finally, in 1907 he was convicted of stealing "one red roan horse" valued at $75 and

various tack and accessories valued at $85.[12] Upon conviction of this last crime, Graham received the life sentence mandated by West Virginia's recidivist statute. This Court did not tarry long on Graham's Eighth Amendment claim,[13] noting only that it could not be maintained "that cruel and unusual punishment [had] been inflicted." *Id.*, at 631.[14]

Undaunted by earlier cases like *Graham* and *Badders*, Rummel attempts to ground his proportionality attack on an alleged "nationwide" trend away from mandatory life sentences and toward "lighter, discretionary sentences." Brief for Petitioner 43–44. According to Rummel, "[n]o jurisdiction in the United States or the Free World punishes habitual offenders as harshly as Texas." *Id.*, at 39. In support of this proposition, Rummel offers detailed charts and tables documenting the history of recidivist statutes in the United States since 1776.

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[12] See Transcript of Record in *Graham* v. *West Virginia*, O. T. 1911, No. 721, pp. 4, 5, 9.

[13] While at the time this Court decided *Graham* the Eighth Amendment's proscription against cruel and unusual punishments had not been held applicable to the States through the Fourteenth Amendment, see, *e. g.*, *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 462 (1947) (plurality opinion), earlier cases had assumed, without deciding, that the States could not inflict cruel and unusual punishments. See, *e. g.*, *Howard* v. *Fleming*, 191 U. S. 126, 135–136 (1903); *McDonald* v. *Massachusetts*, 180 U. S. 311, 313 (1901). *Graham's* reference to *Howard*, *McDonald*, and other cases indicates that it followed a similar course. See 224 U. S., at 631.

[14] Rummel characterizes *Graham* as a case where petitioner argued only that imposition of a life sentence under West Virginia's recidivist statute was, *per se*, a violation of the Eighth Amendment. See Brief for Petitioner 18–19, n. 6. We do not share that reading. The brief submitted on Graham's behalf clearly attacked the alleged disproportionality of his sentence. See Brief for Plaintiff in Error in *Graham* v. *West Virginia*, O. T. 1911, No. 721, pp. 37–38. The brief on behalf of the State of West Virginia, moreover, expressly assumed that Graham was arguing that "the sentence in this case is so disproportionate to the offense as to be cruel and unusual." Brief for Defendant in Error in *Graham* v. *West Virginia*, *supra*, at 19.

Before evaluating this evidence, we believe it important to examine the exact operation of Art. 63 as interpreted by the Texas courts. In order to qualify for a mandatory life sentence under that statute, Rummel had to satisfy a number of requirements. First, he had to be convicted of a felony and actually sentenced to prison.[15] Second, at some time subsequent to his first conviction, Rummel had to be convicted of another felony and again sentenced to imprisonment.[16] Finally, after having been sent to prison a second time, Rummel had to be convicted of a third felony. Thus, under Art. 63, a three-time felon receives a mandatory life sentence, with possibility of parole, only if commission and conviction of each succeeding felony followed conviction for the preceding one, and only if each prior conviction was followed by actual imprisonment. Given this necessary sequence, a recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released. One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail. Article 63 thus is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole.[17]

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[15] Texas courts have interpreted the recidivist statute as requiring not merely that the defendant be convicted of two prior felonies, but also that he actually serve time in prison for each of those offenses. See *Cromeans* v. *State*, 160 Tex. Crim. 135, 138, 268 S. W. 2d 133, 135 (1954).

[16] As the statute has been interpreted, the State must prove that each succeeding conviction was subsequent to both the commission of and the conviction for the prior offense. See *Tyra* v. *State*, 534 S. W. 2d 695, 697–698 (Tex. Crim. App. 1976); *Rogers* v. *State*, 168 Tex. Crim. 306, 308, 325 S. W. 2d 697, 698 (1959).

[17] Thus, it is not true that, as the dissent claims, the Texas scheme subjects a person to life imprisonment "merely because he is a three-time felon." *Post*, at 299, n. 18. On the contrary, Art. 63 mandates such a

In comparing this recidivist program with those presently employed in other States, Rummel creates a complex hierarchy of statutes and places Texas' recidivist scheme alone on the top rung. This isolation is not entirely convincing. Both West Virginia and Washington, for example, impose mandatory life sentences upon the commission of a third felony.[18] Rummel would distinguish those States from Texas because the Supreme Court of Washington and the United States Court of Appeals for the Fourth Circuit, which includes West Virginia, have indicated a willingness to review the proportionality of such sentences under the Eighth Amendment. See *State* v. *Lee*, 87 Wash. 2d 932, 937, n. 4, 558 P. 2d 236, 240, n. 4 (1976) (dictum); *Hart* v. *Coiner*, 483 F. 2d 136 (CA4 1973). But this Court must ultimately decide the meaning of the Eighth Amendment. If we disagree with the decisions of the Supreme Court of Washington and the Court of Appeals for the Fourth Circuit on this point, Washington and West Virginia are for practical purposes indistinguishable from Texas. If we agree with those courts, then of course sentences imposed in Texas, as well as in Washington and West Virginia, are subject to a review for proportionality under the Eighth Amendment. But in either case, the legislative judgment as to punishment in Washington and West Virginia has been the same as that in Texas.

Rummel's charts and tables do appear to indicate that he might have received more lenient treatment in almost any State other than Texas, West Virginia, or Washington. The distinctions, however, are subtle rather than gross. A number of States impose a mandatory life sentence upon conviction of four felonies rather than three.[19] Other States require one

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sentence only after shorter terms of actual imprisonment have proved ineffective.

[18] See Wash. Rev. Code § 9.92.090 (1976); W. Va. Code § 61–11–18 (1977).

[19] See, *e. g.*, Colo. Rev. Stat. § 16–13–101 (1973 and Supp. 1976); Nev.

or more of the felonies to be "violent" to support a life sentence.[20] Still other States leave the imposition of a life sentence after three felonies within the discretion of a judge or jury.[21] It is one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. See *Coker* v. *Georgia*, 433 U. S., at 595–596. It is quite another thing for a court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix.[22]

Nor do Rummel's extensive charts even begin to reflect the complexity of the comparison he asks this Court to make. Texas, we are told, has a relatively liberal policy of granting "good time" credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years. See Brief for Respondent 16–17. We agree with Rummel that his inability to enforce any "right" to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years. Nevertheless, because parole is "an established variation on imprisonment of convicted criminals," *Morrissey* v. *Brewer*, 408 U. S. 471, 477 (1972), a proper assessment of Texas'

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Rev. Stat. § 207.010 (1977); S. D. Comp. Laws Ann. §§ 22–6–1, 22–7–8 (Supp. 1978); Wyo. Stat. § 6–1–110 (1977).

[20] See, *e. g.*, Miss. Code Ann. § 99–19–83 (Supp. 1979).

[21] See, *e. g.*, D. C. Code § 22–104a (1973); Idaho Code § 19–2514 (1979); Okla. Stat., Tit. 21, § 51 (Supp. 1979–1980).

[22] Nor do we have another sort of objective evidence found in *Coker*. After *Furman*, where the Court had declared unconstitutional the death penalty statutes of all of the States as then applied, a majority of the States had re-enacted the death penalty for killings, but had not done so for rape. In *Coker* the plurality found this fact of some importance. See 433 U. S., at 594–595. Here, if there was a watershed comparable to *Furman*, it was *Spencer* v. *Texas*, 385 U. S. 554 (1967), which confirmed, rather than undercut, the constitutionality of recidivist statutes. There thus has been no comparable occasion for contemporary expression of legislative or public opinion on the question of what sort of penalties should be applied to recidivists, or to those who have committed crimes against property.

treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony. See Miss. Code Ann. § 99–19–83 (Supp. 1979).

Another variable complicating the calculus is the role of prosecutorial discretion in any recidivist scheme. It is a matter of common knowledge that prosecutors often exercise their discretion in invoking recidivist statutes or in plea bargaining so as to screen out truly "petty" offenders who fall within the literal terms of such statutes. See *Oyler* v. *Boles*, 368 U. S. 448, 456 (1962) (upholding West Virginia's recidivist scheme over contention that it placed unconstitutional discretion in hands of prosecutor). Indeed, in the present case the State of Texas has asked this Court, in the event that we find Rummel's sentence unconstitutionally disproportionate, to remand the case to the sentencing court so that the State might introduce Rummel's entire criminal record. If, on a remand, the sentencing court were to discover that Rummel had been convicted of one or more felonies in addition to those pleaded in the original indictment, one reasonably might wonder whether that court could then sentence Rummel to life imprisonment even though his recidivist status based on only three felonies had been held to be a "cruel and unusual" punishment.

We offer these additional considerations not as inherent flaws in Rummel's suggested interjurisdictional analysis but as illustrations of the complexities confronting any court that would attempt such a comparison. Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment "grossly disproportionate" to his offenses or to the punishment he would have received in the other States. As Mr. Justice Holmes noted in his dissenting

opinion in *Lochner* v. *New York*, 198 U. S. 45, 76 (1905), our Constitution "is made for people of fundamentally differing views. . . ." Until quite recently, Arizona punished as a felony the theft of any "neat or horned animal," regardless of its value;[23] California considers the theft of "avocados, olives, citrus or deciduous fruits, nuts and artichokes" particularly reprehensible.[24] In one State theft of $100 will earn the offender a fine or a short term in jail;[25] in another State it could earn him a sentence of 10 years' imprisonment.[26] Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.[27]

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[23] See Ariz. Rev. Stat. Ann. § 13-663 (A) (Supp. 1957-1978) (repealed in 1977).

[24] See Cal. Penal Code Ann. § 487 (1) (West 1970).

[25] See, *e. g.*, Idaho Code §§ 18-4604, 18-4607 (1979).

[26] See, *e. g.*, Nev. Rev. Stat. § 205.220 (1973).

[27] The dissent draws some support for its belief that Rummel's sentence is unconstitutional by comparing it with punishments imposed by Texas for crimes other than those committed by Rummel. Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative. Embezzlement, dealing in "hard" drugs, and forgery, to name only three offenses, could be denominated "property related" offenses, and yet each can be viewed as an assault on a unique set of societal values as defined by the political process. The notions embodied in the dissent that if the crime involved "violence," see *post*, at 295-296, n. 12, a more severe penalty is warranted under objective standards simply will not wash, whether it be taken as a matter of morals, history, or law. Caesar's death at the hands of Brutus and his fellow conspirators was undoubtedly violent; the death of Hamlet's father at the hands of his brother, Claudius, by poison, was not. Yet there are few, if any, States which do not punish just as severely murder by poison (or attempted murder by poison) as they do murder or attempted murder by stabbing. The highly placed executive who embezzles huge sums from a state savings and loan association, causing many shareholders of limited means to lose substantial parts of their savings, has committed a crime very different from a man who takes a smaller amount of money from the same savings

Perhaps, as asserted in *Weems*, "time works changes" upon the Eighth Amendment, bringing into existence "new conditions and purposes." 217 U. S., at 373. We all, of course, would like to think that we are "moving down the road toward human decency." *Furman* v. *Georgia*, 408 U. S., at 410 (BLACKMUN, J., dissenting). Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies. Penologists themselves have been unable to agree whether sentences should be light or heavy,[28] discretionary or determinate.[29] This uncertainty

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and loan at the point of a gun. Yet rational people could disagree as to which criminal merits harsher punishment. By the same token, a State cannot be required to treat persons who have committed three "minor" offenses less severely than persons who have committed one or two "more serious" offenses. If nothing else, the three-time offender's conduct supports inferences about his ability to conform with social norms that are quite different from possible inferences about first- or second-time offenders.

In short, the "seriousness" of an offense or a pattern of offenses in modern society is not a line, but a plane. Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving "violence" violates the cruel-and-unusual-punishment prohibition of the Eighth Amendment. As Mr. Justice Frankfurter noted for the Court in *Gore* v. *United States*, 357 U. S. 386, 393 (1958), "[w]hatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy."

[28] Compare A. Von Hirsch, Doing Justice: The Choice of Punishments, Report of the Committee for the Study of Incarceration 140 (1976); M. Yeager, Do Mandatory Prison Sentences for Handgun Offenders Curb Violent Crime?, Technical Report for the United States Conference of Mayors 25–26 (1976); with E. van den Haag, Punishing Criminals: Concerning a Very Old and Painful Question 158–159, 177 (1975). See generally F. Zimring & G. Hawkins, Deterrence: The Legal Threat in Crime Control 234–241, 245–246 (1973).

[29] Compare R. McKay, It's Time to Rehabilitate the Sentencing Process, An Occasional Paper—Aspen Institute for Humanistic Studies 4–5 (1977); Von Hirsch, *supra*, at 98–104; with R. Dawson, Sentencing: The Decision

reinforces our conviction that any "nationwide trend" toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts.

## III

The most casual review of the various criminal justice systems now in force in the 50 States of the Union shows that the line dividing felony theft from petty larceny, a line usually based on the value of the property taken, varies markedly from one State to another. We believe that Texas is entitled to make its own judgment as to where such lines lie, subject only to those strictures of the Eighth Amendment that can be informed by objective factors. See *Coker* v. *Georgia*, 433 U. S., at 592. Moreover, given Rummel's record, Texas was not required to treat him in the same manner as it might treat him were this his first "petty property offense." Having twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State.

The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

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as to Type, Length, and Conditions of Sentence, Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States 381, 414 (1969); Yeager, *supra*, at 25–26. See generally U. S. Dept. of Justice, Determinate Sentencing: Reform or Regression?, Proceedings of the Special Conference on Determinate Sentencing, June 2–3, 1977.

Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.

We therefore hold that the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. The judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE STEWART, concurring.

I am moved to repeat the substance of what I had to say on another occasion about the recidivist legislation of Texas:

> "If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. For it is clear to me that the recidivist procedures adopted in recent years by many other States . . . are far superior to those utilized [here]. But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate. Upon that question I am constrained to join the opinion and judgment of the Court." *Spencer* v. *Texas*, 385 U. S. 554, 569 (concurring opinion).

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The question in this case is whether petitioner was subjected to cruel and unusual punishment in contravention of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment, when he received a mandatory life sentence upon his conviction for a third property-related

felony. Today, the Court holds that petitioner has not been punished unconstitutionally. I dissent.

## I

The facts are simply stated. In 1964, petitioner was convicted for the felony of presenting a credit card with intent to defraud another of approximately $80. In 1969, he was convicted for the felony of passing a forged check with a face value of $28.36. In 1973, petitioner accepted payment in return for his promise to repair an air conditioner. The air conditioner was never repaired, and petitioner was indicted for the felony offense of obtaining $120.75 under false pretenses. He was also charged with being a habitual offender. The Texas habitual offender statute provides a mandatory life sentence for any person convicted of three felonies. See Tex. Penal Code Ann., Art. 63 (Vernon 1925), as amended and recodified, Tex. Penal Code Ann. § 12.42 (d) (1974). Petitioner was convicted of the third felony and, after the State proved the existence of the two earlier felony convictions, was sentenced to mandatory life imprisonment.

After exhausting state remedies, petitioner sought a writ of habeas corpus in the Federal District Court for the Western District of Texas. Petitioner contended that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment. Petitioner did not suggest that the method of punishment—life imprisonment—was constitutionally invalid. Rather, he argued that the punishment was unconstitutional because it was disproportionate to the severity of the three felonies. A panel of the Court of Appeals for the Fifth Circuit accepted petitioner's view, 568 F. 2d 1193 (1978), but the court en banc vacated that decision and affirmed the District Court's denial of the writ of habeas corpus. 587 F. 2d 651 (1979).

This Court today affirms the Fifth Circuit's decision. I dissent because I believe that (i) the penalty for a noncapital offense may be unconstitutionally disproportionate, (ii) the

possibility of parole should not be considered in assessing the nature of the punishment, (iii) a mandatory life sentence is grossly disproportionate as applied to petitioner, and (iv) the conclusion that this petitioner has suffered a violation of his Eighth Amendment rights is compatible with principles of judicial restraint and federalism.

## II

### A

The Eighth Amendment prohibits "cruel and unusual punishments." That language came from Art. I, § 9, of the Virginia Declaration of Rights, which provided that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The words of the Virginia Declaration were taken from the English Bill of Rights of 1689. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif. L. Rev. 839, 840 (1969).

Although the legislative history of the Eighth Amendment is not extensive, we can be certain that the Framers intended to proscribe inhumane methods of punishment. See *Furman* v. *Georgia*, 408 U. S. 238, 319–322 (1972) (MARSHALL, J., concurring); Granucci, *supra*, at 839–842. When the Virginia delegates met to consider the Federal Constitution, for example, Patrick Henry specifically noted the absence of the provisions contained within the Virginia Declaration. Henry feared that without a "cruel and unusual punishments" clause, Congress "may introduce the practice . . . of torturing, to extort a confession of the crime." [1] Indeed, during debate in the First Congress on the adoption of the Bill of Rights, one Congressman objected to adoption of the Eighth Amendment precisely because "villains often deserve whipping, and perhaps having their ears cut off." [2]

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[1] 3 J. Elliot, Debates on the Federal Constitution 447–448 (1876).
[2] 1 Annals of Cong. 754 (1789) (Rep. Livermore).

In two 19th-century cases, the Court considered constitutional challenges to forms of capital punishment. In *Wilkerson* v. *Utah*, 99 U. S. 130, 135 (1879), the Court held that death by shooting did not constitute cruel and unusual punishment. The Court emphasized, however, that torturous methods of execution, such as burning a live offender, would violate the Eighth Amendment. *In re Kemmler*, 136 U. S. 436 (1890), provided the Court with its second opportunity to review methods of carrying out a death penalty. That case involved a constitutional challenge to New York's use of electrocution. Although the Court did not apply the Eighth Amendment to state action, it did conclude that electrocution would not deprive the petitioner of due process of law. See also *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 464 (1947).

B

The scope of the Cruel and Unusual Punishments Clause extends not only to barbarous methods of punishment, but also to punishments that are grossly disproportionate. Disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender. The inquiry focuses on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice. The Court concedes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a noncapital sentence is challenged. Such a limitation finds no support in the history of Eighth Amendment jurisprudence.

The principle of disproportionality is rooted deeply in English constitutional law. The Magna Carta of 1215 insured that "[a] free man shall not be [fined] for a trivial offence,

except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity." [3] By 1400, the English common law had embraced the principle, not always followed in practice, that punishment should not be excessive either in severity or length.[4] One commentator's survey of English law demonstrates that the "cruel and unusual punishments" clause of the English Bill of Rights of 1689 "was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties." Granucci, *supra*, at 860. See *Gregg* v. *Georgia*, 428 U. S. 153, 169 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.).

In *Weems* v. *United States*, 217 U. S. 349 (1910), a public official convicted for falsifying a public record claimed that he suffered cruel and unusual punishment when he was sentenced to serve 15 years' imprisonment in hard labor with chains.[5] The sentence also subjected Weems to loss of civil rights and perpetual surveillance after his release. This Court agreed that the punishment was cruel and unusual. The Court was attentive to the methods of the punishment, *id.*, at 363–364, but its conclusion did not rest solely upon the nature of punishment. The Court relied explicitly upon the

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[3] J. Holt, Magna Carta 323 (1965).

[4] R. Perry, Sources of Our Liberties 236 (1959).

[5] The principle that grossly disproportionate sentences violate the Eighth Amendment was first enunciated in this Court by Mr. Justice Field in *O'Neil* v. *Vermont*, 144 U. S. 323 (1892). In that case, a defendant convicted of 307 offenses for selling alcoholic beverages in Vermont had been sentenced to more than 54 years in prison. The Court did not reach the question whether the sentence violated the Eighth Amendment because the issue had not been raised properly, and because the Eighth Amendment had yet to be applied against the States. *Id.*, at 331–332. But Mr. Justice Field dissented, asserting that the "cruel and unusual punishment" Clause was directed "against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339–340.

relationship between the crime committed and the punishment imposed:

> "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.*, at 366–367.

In both capital and noncapital cases this Court has recognized that the decision in *Weems* v. *United States* "proscribes punishment grossly disproportionate to the severity of the crime." *Ingraham* v. *Wright*, 430 U. S. 651, 667 (1977); see *Hutto* v. *Finney*, 437 U. S. 678, 685 (1978); *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (opinion of WHITE, J.); *Gregg* v. *Georgia*, *supra*, at 171 (opinion of STEWART, POWELL, and STEVENS, JJ.); *Furman* v. *Georgia*, 408 U. S., at 325 (MARSHALL, J., concurring).[6]

In order to resolve the constitutional issue, the *Weems* Court measured the relationship between the punishment and the offense. The Court noted that Weems had been punished more severely than persons in the same jurisdiction who committed more serious crimes, or persons who committed a similar crime in other American jurisdictions. 217 U. S., at 381–382.[7]

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[6] See also Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1377 (1979); Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119 (1979).

[7] The Court notes that *Graham* v. *West Virginia*, 224 U. S. 616, 631 (1912), rejected an Eighth Amendment claim brought by a person sentenced under the West Virginia statute to mandatory life imprisonment for the commission of three felonies. But the *Graham* Court's entire discussion of that claim consists of one sentence: "Nor can it be maintained that cruel and unusual punishment has been inflicted." The Court then cited six cases in support of its statement. The first case was *In re Kemmler*, 136 U. S. 436, 448–449 (1890), in which the Court declined to apply the Eighth Amendment against state action. The *Graham* opinion also cited *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111 (1909), in

*Robinson* v. *California*, 370 U. S. 660, 667 (1962), established that the Cruel and Unusual Punishments Clause applies to the States through the operation of the Fourteenth Amendment. The Court held that imprisonment for the crime of being a drug addict was cruel and unusual. The Court based its holding not upon the method of punishment, but on the nature of the "crime." Because drug addiction is an illness which may be contracted involuntarily, the Court said that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

In *Furman* v. *Georgia*, *supra*, the Court held that the death penalty may constitute cruel and unusual punishment in some circumstances. The special relevance of *Furman* to this case lies in the general acceptance by Members of the Court of two basic principles. First, the Eighth Amendment prohibits grossly excessive punishment.[8] Second, the scope of

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which the Court recognized that no claim was made that the Eighth Amendment controlled state action, and stated that "[w]e can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law." The Eighth Amendment was not applied as a prohibition on state action until this Court's decision in *Robinson* v. *California*, 370 U. S. 660, 667 (1962). A one-sentence holding in a preincorporation decision is hardly relevant to the determination of the case before us today.

*Badders* v. *United States*, 240 U. S. 391 (1916), also adds "little to our knowledge of the scope of the cruel and unusual language." *Furman* v. *Georgia*, 408 U. S. 238, 325 (1972) (MARSHALL, J., concurring). In *Badders*, this Court rejected a claim that concurrent 5-year sentences and a $7,000 fine for seven counts of mail fraud violated the Eighth Amendment. 240 U. S., at 394. *Badders* merely teaches that the Court did not believe that a 5-year sentence for the commission of seven crimes was cruel and unusual.

[8] *Furman* v. *Georgia*, 408 U. S., at 280 (BRENNAN, J., concurring); *id.*, at 312 (WHITE, J., concurring); *id.*, at 331–332 (MARSHALL, J., con-

the Eighth Amendment is to be measured by "evolving standards of decency." See *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (opinion of Warren, C. J.).[9]

In *Coker* v. *Georgia*, *supra*, this Court held that rape of an adult woman may not be punished by the death penalty. The plurality opinion of MR. JUSTICE WHITE stated that a punishment is unconstitutionally excessive "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.*, at 592.[10] The plurality concluded that the death penalty was a grossly disproportionate punishment for the crime of rape. The plurality recognized that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." *Ibid.* To this end, the plurality examined the nature of the crime and attitudes of state legislatures and sentencing juries toward use of the death penalty in rape cases. In a separate opinion, I concurred in the plurality's reasoning that death ordinarily is disproportionate punishment for the crime of raping an adult woman. *Id.*, at 601. Nothing in the *Coker* analysis suggests that principles of disproportionality are applicable only

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curring); *id.*, at 457–458 (POWELL, J., dissenting, joined by BURGER, C. J., and BLACKMUN and REHNQUIST, JJ.).

[9] *Id.*, at 266 (BRENNAN, J., concurring); *id.*, at 329 (MARSHALL, J., concurring); *id.*, at 382 (BURGER, C. J., dissenting, joined by BLACKMUN, POWELL, and REHNQUIST, JJ.); *id.*, at 409 (BLACKMUN, J., dissenting); *id.*, at 420 (POWELL, J., dissenting, joined by BURGER, C. J., and BLACKMUN and REHNQUIST, JJ.).

[10] The *Coker* standard derived from the joint opinion in *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.), which stated that "the inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. . . . Second, the punishment must not be grossly out of proportion to the severity of the crime."

to capital cases. Indeed, the questions posed in *Coker* and this case are the same: whether a punishment that can be imposed for one offense is grossly disproportionate when imposed for another.

In sum, a few basic principles emerge from the history of the Eighth Amendment. Both barbarous forms of punishment and grossly excessive punishments are cruel and unusual. A sentence may be excessive if it serves no acceptable social purpose, or is grossly disproportionate to the seriousness of the crime. The principle of disproportionality has been acknowledged to apply to both capital and noncapital sentences.

## III

Under Texas law, petitioner has been sentenced to a mandatory life sentence. Even so, the Court of Appeals rejected the petitioner's Eighth Amendment claim primarily because it concluded that the petitioner probably would not serve a life sentence. 587 F 2d, at 659 (en banc). In view of good-time credits available under the Texas system, the court concluded that Rummel might serve no more than 10 years. *Ibid.* Thus, the Court of Appeals equated petitioner's sentence to 10 years of imprisonment without the possibility of parole. *Id.*, at 660.

It is true that imposition in Texas of a mandatory life sentence does not necessarily mean that petitioner will spend the rest of his life behind prison walls. If petitioner attains sufficient good-time credits, he may be eligible for parole within 10 or 12 years after he begins serving his life sentence. But petitioner will have no right to early release; he will merely be eligible for parole. And parole is simply an act of executive grace.

Last Term in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979), we held that a criminal conviction extinguishes whatever liberty interest a prisoner has in securing freedom before the end of his lawful sentence. The Court stated unequivocally that a convicted person has "no constitutional or

inherent right . . . to be conditionally released before the expiration of a valid sentence." *Id.*, at 7. Of course, a State may create legitimate expectations that are entitled to procedural protection under the Due Process Clause of the Fourteenth Amendment, but Texas has not chosen to create a cognizable interest in parole. The Court of Appeals for the Fifth Circuit has held that a Texas prisoner has no constitutionally enforceable interest in being freed before the expiration of his sentence. See *Johnson* v. *Wells*, 566 F. 2d 1016, 1018 (1978); *Craft* v. *Texas Board of Pardons and Paroles*, 550 F. 2d 1054, 1056 (1977).

A holding that the possibility of parole discounts a prisoner's sentence for the purposes of the Eighth Amendment would be cruelly ironic. The combined effect of our holdings under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment would allow a State to defend an Eighth Amendment claim by contending that parole is probable even though the prisoner cannot enforce that expectation. Such an approach is inconsistent with the Eighth Amendment. The Court has never before failed to examine a prisoner's Eighth Amendment claim because of the speculation that he might be pardoned before the sentence was carried out.

Recent events in Texas demonstrate that parole remains a matter of executive grace. In June 1979, the Governor of Texas refused to grant parole to 79% of the state prisoners whom the parole board recommended for release.[11] The State's chief executive acted well within his rights in declining to follow the board, but his actions emphasize the speculative nature of the Court of Appeals' reasoning. As this case comes to us, petitioner has been deprived by operation of state law of his right to freedom from imprisonment for the rest of his life. We should judge the case accordingly.

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[11] Austin American-Statesman, Sept. 23, 1979, p. A1, col. 4. The newspaper reported that in a 6-month period including June 1979, the Governor rejected 33% of the parole board recommendations that prisoners be released. *Ibid.*

## IV

The Eighth Amendment commands this Court to enforce the constitutional limitation of the Cruel and Unusual Punishments Clause. In discharging this responsibility, we should minimize the risk of constitutionalizing the personal predilections of federal judges by relying upon certain objective factors. Among these are (i) the nature of the offense, see *Coker* v. *Georgia*, 433 U. S., at 598; *id.*, at 603 (POWELL, J., concurring in judgment in part and dissenting in part); (ii) the sentence imposed for commission of the same crime in other jurisdictions, see *id.*, at 593–594; *Gregg* v. *Georgia*, 428 U. S., at 179–180; *Weems* v. *United States*, 217 U. S., at 380; cf. *Trop* v. *Dulles*, 356 U. S., at 102–103; and (iii) the sentence imposed upon other criminals in the same jurisdiction, *Weems* v. *United States*, *supra*, at 380–381.

### A

Each of the crimes that underlies the petitioner's conviction as a habitual offender involves the use of fraud to obtain small sums of money ranging from $28.36 to $120.75. In total, the three crimes involved slightly less than $230. None of the crimes involved injury to one's person, threat of injury to one's person, violence, the threat of violence, or the use of a weapon. Nor does the commission of any such crimes ordinarily involve a threat of violent action against another person or his property. It is difficult to imagine felonies that pose less danger to the peace and good order of a civilized society than the three crimes committed by the petitioner. Indeed, the state legislature's recodification of its criminal law supports this conclusion. Since the petitioner was convicted as a habitual offender, the State has reclassified his third offense, theft by false pretext, as a misdemeanor. Tex. Penal Code Ann. § 31.03 (d)(3) (Supp. 1980).[12]

[12] The Court suggests that an inquiry into the nature of the offense at issue in this case inevitably involves identifying subjective distinctions beyond the province of the judiciary. *Ante*, at 275–276. Yet the distinc-

## B

Apparently, only 12 States have ever enacted habitual offender statutes imposing a mandatory life sentence for the commission of two or three nonviolent felonies and only 3, Texas, Washington, and West Virginia, have retained such a statute.[13] Thus, three-fourths of the States that experimented

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tion between forging a check for $28 and committing a violent crime or one that threatens violence is surely no more difficult for the judiciary to perceive than the distinction between the gravity of murder and rape. See *Coker* v. *Georgia*, 433 U. S. 584, 598 (1977); *id.*, at 603 (POWELL, J., concurring in judgment in part and dissenting in part). I do not suggest that all criminal acts may be separated into precisely identifiable compartments. A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault. But the difficulties of line-drawing that might be presented in other cases need not obscure our vision here.

[13] The nine States that previously enforced such laws include: (1) California, 1927 Cal. Stats., ch. 634, § 1, p. 1066, repealed, 1935 Cal. Stats., ch. 602–603, p. 1699; ch. 754, § 1, p. 2121. See Cal. Penal Code Ann. § 667.5 (West Supp. 1979) (Habitual offender statute allows no more than three years' additional sentence for the commission of a previous felony). (2) Indiana, 1907 Ind. Acts, ch. 82, § 1, p. 109, repealed, 1977 Ind. Acts No. 340, § 121, p. 1594. See Ind. Code § 35–50–2–8 (Supp. 1979) (30 years' additional sentence upon the conviction of a third felony). (3) Kansas, 1927 Kan. Sess. Laws, ch. 191, § 1, p. 247, repealed, 1939 Kan. Sess. Laws, ch. 178, § 1, p. 299. See 1978 Kan. Sess. Laws, ch. 120, § 4 (2) (Up to the treble maximum penalty may be given upon the commission of the third felony). (4) Kentucky, 1893 Ky. Acts, ch. 182, Art. I, § 4, p. 757, repealed, 1974 Ky. Acts, ch. 406, § 280, p. 873. See Ky. Rev. Stat. § 532.080 (Supp. 1978) (A persistent felony offender may receive a discretionary life sentence upon the conviction of a Class A or B felony). (5) Massachusetts, 1818 Mass. Acts, ch. 176, §§ 5–6, p. 603, repealed, 1833 Mass. Acts, ch. 85, p. 618. See Mass. Gen. Laws Ann., ch. 279, § 25 (West 1972) (A person convicted of three specified felonies receives the maximum penalty provided for the third offense). (6) New York, 1796 N. Y. Laws, ch. 30, p. 669, repealed, 1881 N. Y. Laws, ch. 676, §§ 688–690, p. 181. See N. Y. Penal Code §§ 70.04, 70.06–70.10 (McKinney 1975 and Supp. 1979–1980) (mandatory life imprisonment upon the conviction for a third violent felony). (7) Ohio, 1885 Ohio Leg. Acts, No. 751, § 2, p. 236, repealed, 1929 Ohio Leg. Acts, No. 8, §§ 1–2, p. 40. See Ohio

with the Texas scheme appear to have decided that the imposition of a mandatory life sentence upon some persons who have committed three felonies represents excess punishment. Kentucky, for example, replaced the mandatory life sentence with a more flexible scheme "because of a judgment that under some circumstances life imprisonment for an habitual criminal is not justified. An example would be an offender who has committed three Class D felonies, none involving injury to person." Commentary following Criminal Law of Kentucky Annotated, Penal Code § 532.080, p. 790 (1978). The State of Kansas abolished its statute mandating a life sentence for the commission of three felonies after a state legislative commission concluded that "[t]he legislative policy as expressed in the habitual criminal law bears no particular resemblance to the enforcement policy of prosecutors and judges." Kansas Legislative Council, The Operation of the Kansas Habitual Criminal Law, Pub. No. 47, p. 4 (1936). In the eight years following enactment of the Kansas statute, only 96 of the 733 defendants who committed their third felony were sentenced to life imprisonment. *Id.*, at 32–33. This statistic strongly supports the belief that prosecutors and judges thought the habitual offender statute too severe.[14] In Wash-

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Rev. Code Ann. §§ 2929.01, 2929.11, 2929.12 (Supp. 1979) (no mandatory habitual offender penalties). (8) Oregon, 1921 Ore. Laws, ch. 70, § 1, p. 97, repealed, 1927 Ore. Laws, ch. 334, §§ 1–3, p. 432. See Ore. Rev. Stat. §§ 161.725, 166.230 (1977) (life sentence upon conviction of fourth armed felony or attempted felony). (9) Virginia, 1848 Va. Acts, ch. 199, § 26, p. 752, repealed, 1916 Va. Acts, chs. 29–30, pp. 34–35. See 1979 Va. Acts, ch. 411 (no habitual offender statute).

In addition to Texas, Washington, see Wash. Rev. Code § 9.92.090 (1976), and West Virginia, see W. Va. Code § 61–11–18 (1977), continue to provide mandatory life imprisonment upon the commission of a third nonviolent felony.

[14] See Note, The Kansas Habitual Criminal Act, 9 Washburn L. J. 244, 247–250 (1970); see also *State* v. *Lee*, 87 Wash. 2d 932, 940–942, 558 P. 2d 236, 241–242 (1976) (Rosellini, J., dissenting); *State* v. *Thomas*, 16 Wash. App. 1, 13–15, 553 P. 2d 1357, 1365–1366 (1976); Commentary fol-

ington, which retains the Texas rule, the State Supreme Court has suggested that application of its statute to persons like the petitioner might constitute cruel and unusual punishment. See *State* v. *Lee*, 87 Wash. 2d 932, 937, n. 4, 558 P. 2d 236, 240, n. 4 (1976).

More than three-quarters of American jurisdictions have never adopted a habitual offender statute that would commit the petitioner to mandatory life imprisonment. The jurisdictions that currently employ habitual offender statutes either (i) require the commission of more than three offenses,[15] (ii) require the commission of at least one violent crime,[16] (iii) limit a mandatory penalty to less than life,[17] or (iv) grant discretion to the sentencing authority.[18] In none of the

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lowing Criminal Law of Kentucky Annotated, Penal Code § 532.080, p. 790 (1978).

[15] Four States impose a mandatory life sentence upon the commission of a fourth felony. See Colo. Rev. Stat. § 16–13–101 (2) (1978); Nev. Rev. Stat. § 207.010 (2) (1977); S. D. Comp. Laws Ann. §§ 22–6–1, 22–7–8 (1979); Wyo. Stat. § 6–1–110 (1977). Thus, even if the line between these States and Texas, West Virginia, and Washington, is "subtle rather than gross," *ante*, at 279, the most that one can say is that 7 of the 50 States punish the commission of four or fewer felonies with a mandatory life sentence.

[16] See, *e. g.*, Del. Code Ann., Tit. 11, §§ 4214, 4215 (1975 and Supp. 1978) (mandatory life sentence for one who has committed two felonies and commits a third specified felony involving violence or the threat of violence); Miss. Code Ann. § 99–19–83 (Supp. 1979) (mandatory life sentence for one who commits three felonies at least one of which is violent).

[17] See, *e. g.*, N. M. Stat. Ann. § 31–18–17 (Supp. 1979) (Persons who have committed two felonies punishable by at least one year in prison receive four years' additional sentence upon the commission of a third felony and eight years upon the commission of a fourth felony); Wis. Stat. § 939.62 (1977) (Persons who have committed one felony within 5 years may be sentenced to 10 years' additional sentence upon the commission of an offense punishable by a term greater than 10 years).

[18] See, *e. g.*, D. C. Code § 22–104a (1973) (Persons who commit three felonies may be sentenced to life); Idaho Code § 19–2514 (1979) (Persons who have committed three felonies may receive a sentence ranging from

jurisdictions could the petitioner have received a mandatory life sentence merely upon the showing that he committed three nonviolent property-related offenses.[19]

The federal habitual offender statute also differs materially from the Texas statute. Title 18 U. S. C. § 3575 provides increased sentences for "dangerous special offenders" who have been convicted of a felony. A defendant is a "dangerous special offender" if he has committed two or more previous felonies, one of them within the last five years, if the current felony arose from a pattern of conduct "which constituted a substantial source of his income, and in which he manifested special skill or expertise," or if the felony involved a criminal conspiracy in which the defendant played a supervisory role. § 3575 (e). Federal courts may sentence such persons "to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony."

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five years to life). Statutes that permit the imposition of a discretionary life sentence for the commission of three felonies are fundamentally different from the statute under review in this case. In a discretionary jurisdiction, the question at sentencing is whether a three-time felon has engaged in behavior other than the commission of three felonies that justifies the imposition of the maximum permissible sentence. In such a jurisdiction, therefore, other evidence of dangerousness may justify imposition of a life sentence. In Texas, a person receives a mandatory life sentence merely because he is a three-time felon.

[19] A State's choice of a sentence will, of course, never be unconstitutional simply because the penalty is harsher than the sentence imposed by other States for the same crime. Such a rule would be inconsistent with principles of federalism. The Eighth Amendment prohibits grossly disproportionate punishment, but it does not require local sentencing decisions to be controlled by majority vote of the States. Nevertheless, a comparison of the Texas standard with the sentencing statutes of other States is one method of "assess[ing] contemporary values concerning the infliction of a challenged sanction." *Gregg* v. *Georgia*, 428 U. S., at 173 (opinion of STEWART, POWELL, and STEVENS, JJ.). The relevant objective factors should be considered together and, although the weight assigned to each may vary, no single factor will ever be controlling.

§ 3575 (b).[20] Thus, Congress and an overwhelming number of state legislatures have not adopted the Texas scheme. These legislative decisions lend credence to the view that a mandatory life sentence for the commission of three nonviolent felonies is unconstitutionally disproportionate.[21]

C

Finally, it is necessary to examine the punishment that Texas provides for other criminals. First and second offenders who commit more serious crimes than the petitioner may receive markedly less severe sentences. The only first-time offender subject to a mandatory life sentence is a person

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[20] The proportionality principle was incorporated into the bill after the Senate Judiciary Committee heard testimony that a sentencing authority considering the punishment due a dangerous special offender should "examine each substantive offense and make some determination based upon the gravity of that offense as to the ultimate maximum which seems to be wise." Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 205 (1969) (testimony of Professor Peter W. Low of the University of Virginia School of Law). See Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99, 118 (1972).

[21] The American Law Institute proposes that a felon be sentenced to an extended term of punishment only if he is a persistent offender, professional criminal, dangerous mentally abnormal person whose extended commitment is necessary for the protection of the public, or "a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted." ALI, Model Penal Code § 7.03 (Prop. Off. Draft 1962). The term for a multiple offender may not exceed the longest sentences of imprisonment authorized for each of the offender's crimes if they ran consecutively. *Ibid.* Under this proposal the petitioner could have been sentenced up to 25 years. *Ante*, at 269.

The American Bar Association has proposed that habitual offenders be sentenced to no more than 25 years and that "[a]ny increased term which can be imposed because of prior criminality should be related in severity to the sentence otherwise provided for the new offense." The choice of sentence would be left to the discretion of the sentencing court. ABA Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 3.3 (App. Draft 1968).

convicted of capital murder. Tex. Penal Code §§ 12.31, 19.03 (1974). A person who commits a first-degree felony, including murder, aggravated kidnaping, or aggravated rape, may be imprisoned from 5 to 99 years. §§ 19.02, 21.03; 12.32 (1974 and Supp. 1980). Persons who commit a second-degree felony, including voluntary manslaughter, rape, or robbery, may be punished with a sentence of between 2 and 20 years. § 12.33 (1974). A person who commits a second felony is punished as if he had committed a felony of the next higher degree. §§ 12.42 (a)–(b) (1974). Thus, a person who rapes twice may receive a 5-year sentence. He also may, but need not, receive a sentence functionally equivalent to life imprisonment.

The State argues that these comparisons are not illuminating because a three-time recidivist may be sentenced more harshly than a first-time offender. Of course, the State may mandate extra punishment for a recidivist. See *Oyler* v. *Boles*, 368 U. S. 448 (1962). In Texas a person convicted twice of the unauthorized use of a vehicle receives a greater sentence than a person once convicted for that crime, but he does not receive a sentence as great as a person who rapes twice. Compare §§ 12.42 (a) and 31.07 with § 12.42 (b); § 21.02 (1974 and Supp. 1980). Such a statutory scheme demonstrates that the state legislature has attempted to choose a punishment in proportion to the nature and number of offenses committed.

Texas recognizes when it sentences two-time offenders that the amount of punishment should vary with the severity of the offenses committed. But all three-time felons receive the same sentence. In my view, imposition of the same punishment upon persons who have committed completely different types of crimes raises serious doubts about the proportionality of the sentence applied to the least harmful offender. Of course, the Constitution does not bar mandatory sentences. I merely note that the operation of the Texas habitual offender system raises a further question about the extent to which a

mandatory life sentence, no doubt a suitable sentence for a person who has committed three violent crimes, also is a proportionate punishment for a person who has committed the three crimes involved in this case.

D

Examination of the objective factors traditionally employed by the Court to assess the proportionality of a sentence demonstrates that petitioner suffers a cruel and unusual punishment. Petitioner has been sentenced to the penultimate criminal penalty because he committed three offenses defrauding others of about $230. The nature of the crimes does not suggest that petitioner ever engaged in conduct that threatened another's person, involved a trespass, or endangered in any way the peace of society. A comparison of the sentence petitioner received with the sentences provided by habitual offender statutes of other American jurisdictions demonstrates that only two other States authorize the same punishment. A comparison of petitioner to other criminals sentenced in Texas shows that he has been punished for three property-related offenses with a harsher sentence than that given first-time offenders or two-time offenders convicted of far more serious offenses. The Texas system assumes that all three-time offenders deserve the same punishment whether they commit three murders or cash three fraudulent checks.

The petitioner has committed criminal acts for which he may be punished. He has been given a sentence that is not inherently barbarous. But the relationship between the criminal acts and the sentence is grossly disproportionate. For having defrauded others of about $230, the State of Texas has deprived petitioner of his freedom for the rest of his life. The State has not attempted to justify the sentence as necessary either to deter other persons or to isolate a potentially violent individual. Nor has petitioner's status as a habitual offender been shown to justify a mandatory life sentence. My view, informed by examination of the "objective indicia

that reflect the public attitude toward a given sanction," *Gregg* v. *Georgia*, 428 U. S., at 173, is that this punishment violates the principle of proportionality contained within the Cruel and Unusual Punishments Clause.

## V

The Court today agrees with the State's arguments that a decision in petitioner's favor would violate principles of federalism and, because of difficulty in formulating standards to guide the decision of the federal courts, would lead to excessive interference with state sentencing decisions. Neither contention is convincing.

Each State has sovereign responsibilities to promulgate and enforce its criminal law. In our federal system we should never forget that the Constitution "recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments." *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78–79 (1938), quoting *Baltimore & Ohio R. Co.* v. *Baugh*, 149 U. S. 368, 401 (1893) (Field, J., dissenting). But even as the Constitution recognizes a sphere of state activity free from federal interference, it explicitly compels the States to follow certain constitutional commands. When we apply the Cruel and Unusual Punishments Clause against the States, we merely enforce an obligation that the Constitution has created. As MR. JUSTICE REHNQUIST has stated, "[c]ourts are exercising no more than the judicial function conferred upon them by Art. III of the Constitution when they assess, in a case before them, whether or not a particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority of that body." *Furman* v. *Georgia*, 408 U. S., at 466 (dissenting opinion). See *Weems* v. *United States*, 217 U. S., at 379.

Because the State believes that the federal courts can formulate no practicable standard to identify grossly dispropor-

tionate sentences, it fears that the courts would intervene into state criminal justice systems at will. Such a "floodgates" argument can be easy to make and difficult to rebut. But in this case we can identify and apply objective criteria that reflect constitutional standards of punishment and minimize the risk of judicial subjectivity. Moreover, we can rely upon the experience of the United States Court of Appeals for the Fourth Circuit in applying criteria similar to those that I believe should govern this case.

In 1974, the Fourth Circuit considered the claim of a West Virginia prisoner who alleged that the imposition of a mandatory life sentence for three nonviolent crimes violated the Eighth Amendment. In *Hart* v. *Coiner*, 483 F. 2d 136 (1973), cert. denied, 415 U. S. 983 (1974), the court held that the mandatory sentence was unconstitutional as applied to the prisoner. The court noted that none of the offenses involved violence or the danger of violence, that only a few States would apply such a sentence, and that West Virginia gave less severe sentences to first- and second-time offenders who committed more serious offenses. The holding in *Hart* v. *Coiner* is the holding that the State contends will undercut the ability of the States to exercise independent sentencing authority. Yet the Fourth Circuit subsequently has found only twice that noncapital sentences violate the Eighth Amendment. In *Davis* v. *Davis*, 601 F. 2d 153 (1979) (en banc), the court held that a 40-year sentence for possession and distribution of less than nine ounces of marihuana was cruel and unusual. In *Roberts* v. *Collins*, 544 F. 2d 168 (1976), the court held that a person could not receive a longer sentence for a lesser included offense (assault) than he could have received for the greater offense (assault with intent to murder).[22]

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[22] In *Ralph* v. *Warden*, 438 F. 2d 786 (1970), the Fourth Circuit also applied the Eighth Amendment to hold that rape may not be punished by death. This Court reached the same result seven years later in *Coker* v. *Georgia*, 433 U. S. 584 (1977).

More significant are those cases in which the Fourth Circuit held that the principles of *Hart* v. *Coiner* were inapplicable. In a case decided the same day as *Hart* v. *Coiner*, the Court of Appeals held that a 10-year sentence given for two obscene telephone calls did not violate the Cruel and Unusual Punishments Clause. The court stated that "[w]hatever may be our subjective view of the matter, we fail to discern here objective factors establishing disproportionality in violation of the eighth amendment." *Wood* v. *South Carolina*, 483 F. 2d 149, 150 (1973). In *Griffin* v. *Warden*, 517 F. 2d 756 (1975), the court refused to hold that the West Virginia statute was unconstitutionally applied to a person who had been convicted of breaking and entering a gasoline and grocery store, burglary of a residence, and grand larceny. The court distinguished *Hart* v. *Coiner* on the ground that Griffin's offenses "clearly involve the potentiality of violence and danger to life as well as property." 517 F. 2d, at 757. Similarly, the Fourth Circuit turned aside an Eighth Amendment challenge to the imposition of a 10- to 20-year sentence for statutory rape of a 13-year-old female. *Hall* v. *McKenzie*, 537 F. 2d 1232, 1235–1236 (1976). The court emphasized that the sentence was less severe than a mandatory life sentence, that the petitioner would have received a similar sentence in 17 other American jurisdictions, and that the crime involved violation of personal integrity and the potential of physical injury. The Fourth Circuit also has rejected Eighth Amendment challenges brought by persons sentenced to 12 years for possession and distribution of heroin, *United States* v. *Atkinson*, 513 F. 2d 38, 42 (1975), 2 years for unlawful possession of a firearm, *United States* v. *Wooten*, 503 F. 2d 65, 67 (1974), 15 years for assault with intent to commit murder, *Robinson* v. *Warden*, 455 F. 2d 1172 (1972), and 40 years for kidnaping, *United States* v. *Martell*, 335 F. 2d 764 (1964).[23]

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[23] The Fourth Circuit also has held that a sentence of eight years for possessing a firearm as a convicted felon, given to a felon previously con-

I do not suggest that each of the decisions in which the Court of Appeals for the Fourth Circuit applied *Hart* v. *Coiner* is necessarily correct. But I do believe that the body of Eighth Amendment law that has developed in that Circuit constitutes impressive empirical evidence that the federal courts are capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy.[24]

## VI

I recognize that the difference between the petitioner's grossly disproportionate sentence and other prisoners' constitutionally valid sentences is not separated by the clear distinction that separates capital from noncapital punishment. "But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere." *Pearce* v. *Commissioner*, 315 U. S. 543, 558 (1942) (Frankfurter, J., dissenting). The

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victed of manslaughter and breaking and entering, was not disproportionate under 18 U. S. C. § 3575. *United States* v. *Williamson*, 567 F. 2d 610, 616 (1977). See n. 20, *supra*, and accompanying text.

[24] The District Courts in the Fourth Circuit also have applied the Eighth Amendment carefully. Although one District Court has held that a sentence of 48 years for safecracking is constitutionally disproportionate, see *Thacker* v. *Garrison*, 445 F. Supp. 376 (WDNC 1978), other District Courts have found no constitutional infirmity in the disenfranchisement of convicted persons, *Thiess* v. *State Board*, 387 F. Supp. 1038, 1042 (Md. 1974) (three-judge court), a 5-year sentence for distributing marihuana, *Queen* v. *Leeke*, 457 F. Supp. 476 (SC 1978), and a 5-year sentence for possession of marihuana with intent to distribute that was suspended for 20 years on condition of payment of a $1,500 fine and nine months in jail. *Wolkind* v. *Selph*, 473 F. Supp. 675 (ED Va. 1979.)

Supreme Courts in two States within the Fourth Circuit have upheld as constitutional a 20-year sentence for a person convicted of burglary who had a prior conviction for armed robbery, *Martin* v. *Leverette*, — W. Va. —, ———, 244 S. E. 2d 39, 43–44 (1978), and a life sentence for murder, *Simmons* v. *State*, 264 S. C. 417, 420, 215 S. E. 2d 883, 884 (1975).

Court has, in my view, chosen the easiest line rather than the best.[25]

It is also true that this Court has not heretofore invalidated a mandatory life sentence under the Eighth Amendment. Yet our precedents establish that the duty to review the disproportionality of sentences extends to noncapital cases. *Supra*, at 289–293. The reach of the Eighth Amendment cannot be restricted only to those claims previously adjudicated under the Cruel and Unusual Punishments Clause. "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.'" *Weems* v. *United States*, 217 U. S., at 373.

We are construing a living Constitution. The sentence imposed upon the petitioner would be viewed as grossly unjust by virtually every layman and lawyer. In my view, objective criteria clearly establish that a mandatory life sentence for defrauding persons of about $230 crosses any rationally drawn line separating punishment that lawfully may be imposed from that which is proscribed by the Eighth Amendment. I would reverse the decision of the Court of Appeals.

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[25] The Court concedes, as it must, that a mandatory life sentence may be constitutionally disproportionate to the severity of an offense. *Ante*, at 274, n. 11. Yet its opinion suggests no basis in principle for distinguishing between permissible and grossly disproportionate life imprisonment.

# VANCE ET AL. *v.* UNIVERSAL AMUSEMENT CO., INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-1588. Argued November 28, 1979—Decided March 18, 1980

*Held:* A Texas public nuisance statute, construed as authorizing state judges, on the basis of a showing that a theater exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene, is unconstitutional as authorizing an invalid prior restraint. The statute cannot be considered to be valid on the asserted ground that it constitutes no greater a prior restraint than any criminal statute, since presumably an exhibitor would be subject to contempt proceedings for violating a preliminary restraining order under the statute even if the film is ultimately found to be nonobscene, whereas nonobscenity would be a defense to any criminal prosecution. Nor is the statute saved merely because the temporary restraint is entered by a state trial judge rather than an administrative censor. That a judge might be thought more likely than an administrative censor to determine accurately that a work is obscene does not change the unconstitutional character of the restraint if erroneously entered. Thus, the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of the nuisance statute against motion picture exhibitors. Cf. *Freedman* v. *Maryland*, 380 U. S. 51; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546.

587 F. 2d 159, affirmed.

*Lonny F. Zwiener*, Assistant Attorney General of Texas, argued the cause for appellants. With him on the brief were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Ted L. Hartley*, and *Douglas B. Owen* and *Gerald C. Carruth*, Assistant Attorneys General.

*Frierson M. Graves, Jr.*, argued the cause for appellees and filed a brief for appellee King Arts Theatre, Inc.*

*Charles H. Keating, Jr., pro se, Richard M. Bertsch, James J. Clancy,

PER CURIAM.

The question presented in this unusual obscenity case is whether the United States Court of Appeals for the Fifth Circuit correctly held a Texas public nuisance statute unconstitutional. The Court of Appeals read the Texas statute as authorizing a prior restraint of indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt review of a preliminary finding of probable obscenity. Cf. *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975). In this Court, appellants argue that such a restraint is no more serious than that imposed by Texas' criminal statutes and that it is therefore constitutional. We find appellants' argument unpersuasive and affirm the judgment of the Court of Appeals.

In 1973, appellee King Arts Theatre, Inc. (hereafter appellee), operated an indoor, adults-only motion picture theater. In October of that year, appellee's landlord gave notice that the theater's lease would be terminated. The notice stated that the County Attorney had informed the landlord that he intended to obtain an injunction to abate the theater as a public nuisance in order to prevent the future showing of allegedly obscene motion pictures. Appellee responded by filing suit in the United States District Court for the Northern District of Texas seeking an injunction and declaratory relief to forestall any action by the County Attorney under the Texas nuisance statutes. The case was transferred to a three-judge District Court sitting in the Southern District of Texas for consolidation with a number of other pending obscenity cases.

Two different Texas statutes were in issue at that point.

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and *Bruce A. Taylor* filed a brief for Mr. Keating as *amicus curiae* urging reversal.

*Michael A. Bamberger* filed a brief for the American Booksellers Association, Inc., et al. as *amici curiae* urging affirmance.

The first, Tex. Rev. Civ. Stat. Ann., Art. 4666 (Vernon 1952),[1] authorizes injunction suits in the name of the State against alleged nuisances. If successful, "judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year," unless certain conditions are met. The second nuisance statute, Art. 4667 (a) (Vernon Supp. 1978), provides that certain habitual uses of premises shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen. Among the prohibited uses is "the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material." [2]

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[1] "Art. 4666. Nuisance; prosecution

"Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and for the State in the county where such conditions are violated, all such suits to be brought by the district or county attorney of such county."

In the early stages of the litigation the parties appear to have assumed that this statute applied to the exhibition of obscene motion pictures; at least the District Court so understood the statute. The Court of Appeals, however, read Art. 4666 as applicable only to the types of nuisance specified in Art. 4664 none of which relates to obscenity. See n. 6, *infra*.

[2] "Art. 4667. Injunctions to abate public nuisances

"(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses

The three-judge District Court held that both of these statutes authorize state judges, on the basis of a showing that obscene films have been exhibited in the past, to prohibit the future exhibition of motion pictures that have not yet been found to be obscene. 404 F. Supp. 33 (1975). Recognizing that it is not unusual in nuisance litigation to prohibit future conduct on the basis of a finding of undesirable past or present conduct, the District Court read *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), to require a special analysis when the prohibited future conduct may be protected by the First Amendment.[3] The routine abatement procedure, which the District Court characterized as "the heavy hand of the public nuisance statute," was considered constitutionally deficient in the First Amendment context.

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shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:

"(1) For gambling, gambling promotion, or communicating gambling information prohibited by law;

"(2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;

"(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;

"(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;

"(5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law."

[3] "In its defense the state has tried to distinguish the instant case from *Near* v. *Minnesota, supra,* but the attempt is not successful. In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be 'dim and uncertain.' *Bantam Books* v. *Sullivan,* 372 U. S. [58, 66 (1963)]. The separation of these forms of speech calls for 'sensitive tools,' *Speiser* v. *Randall,* 357 U. S. 513 . . . (1958), not the heavy hand of the public nuisance statute." 404 F. Supp., at 44.

Specifically, the District Court noted that a general prohibition would operate as a prior restraint on unnamed motion pictures, and that even orders temporarily restraining the exhibition of specific films could be entered *ex parte*.[4] Moreover, such a temporary restraining order could be extended by a temporary injunction based on a showing of probable success on the merits and without a final determination of obscenity.[5] The District Court concluded that the nuisance statutes, when coupled with the Texas Rules of Civil Procedure governing injunctions, operate as an invalid prior restraint on the exercise of First Amendment rights.

Because the three-judge District Court granted only declaratory and not injunctive relief, the State appealed to the United States Court of Appeals for the Fifth Circuit. See *Gerstein* v. *Coe*, 417 U. S. 279 (1974). A divided panel of that court reversed. 559 F. 2d 1286 (1977). The panel

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[4] In dissent, MR. JUSTICE WHITE incorrectly assumes that it is "undisputed that any injunction granted under Art. 4667 (a) will be phrased in terms of the *Miller* v. *California*, 413 U. S. 15 (1973), definition of obscenity." *Post*, at 321. This is by no means necessarily so. Under the Texas statutes a temporary injunction prohibiting the exhibition of specific named films could be entered on the basis of a showing of probability of success on the merits of the obscenity issue. Even if it were ultimately determined that the film is not obscene, the exhibitor could be punished for contempt of court for showing the film before the obscenity issue was finally resolved.

[5] "The specific requirements of obtaining an injunction in Texas, which would presumably be utilized in actions pursuant to article 4667, leave much to be desired if they are used in the obscenity context. Rules 680–693a of the Texas Rules of Civil Procedure provide the injunction procedures for Texas. Pursuant to those rules, the state could obtain a temporary restraining order lasting up to ten days, ex parte. As soon as possible, within that ten days, however, a hearing on a temporary injunction is obtainable. The temporary injunction is not a final adjudication on the merits but, once it is obtained, there is no provision for treating the case any differently from any other civil case. The lack of a provision for a swift final adjudication on the obscenity question raises serious doubts of the constitutional usability of the injunction process in Texas for an obscenity situation." 404 F. Supp., at 46.

majority acknowledged that if Art. 4666 authorized the closing of a motion picture theater for all uses for a year, it "would pose serious first amendment questions," 559 F. 2d, at 1290, but held that the District Court had misconstrued Art. 4666 in that it was not intended to apply to obscenity cases.[6]

The panel majority disagreed more fundamentally with the District Court's view of Art. 4667 (a). It held that the injunction procedure authorized by that statute was "basically sound" in its application to an establishment such as appellee's:

> "The statute authorizes an injunction against the commercial manufacture, distribution or exhibition of *obscene* material only. Because the injunction follows, rather than precedes, a judicial determination that obscene material has been shown or distributed or manufactured on the premises and because its prohibitions can apply only to further dealings with obscene and unprotected material, it does not constitute a prior restraint." 559 F. 2d, at 1292 (emphasis in original).

Further, the panel majority found no problem under *Freedman* v. *Maryland*, 380 U. S. 51 (1965), because any temporary restraint entered pending a final adjudication on the issue of obscenity would be imposed by a judge, not an administrative censor. The judgment of the District Court was therefore reversed.[7]

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[6] The panel interpreted the "such a nuisance" language in the first sentence of Art. 4666, see n. 1, *supra*, as referring to the definition of "common nuisance[s]" in Art. 4664 (Vernon Supp. 1978): gambling houses, houses of prostitution, and places where intoxicating liquors are kept.

[7] Judge Thornberry, dissenting in part, relied on the reasoning of the three-judge District Court:

"As the district court wrote:

'Pursuant to [Rules 680–693a of the Texas Rules of Civil Procedure], the state could obtain a temporary restraining order lasting up to ten days, ex parte. As soon as possible, within that ten days, however, a hearing on a temporary injunction is obtainable. The temporary injunc-

The Court of Appeals granted rehearing en banc, and reversed the panel's holding that Art. 4667 (a) is constitutional. 587 F. 2d 159 (1978).[8] The 8-to-6 majority found the statute objectionable because it "would allow the issuance of an injunction against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute," *id.*, at 168, and "lacks the procedural safeguards required under *Freedman* v. *Maryland*, 380 U. S. 51. . . ." *Id.*, at 169.[9] The dissenters wrote that a pragmatic assessment of the statute's operation indicated that once the contemplated injunction was in effect, it would impose no greater a prior restraint than a criminal statute forbidding exhibition of materials deemed obscene under *Miller* v. *California*, 413 U. S. 15 (1973).[10]

The Texas defendants appealed to this Court, and we noted probable jurisdiction. 442 U. S. 928. We limit our review

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tion is not a final adjudication on the merits but, once it is obtained, there is no provision for treating the [obscenity] case any differently from any other civil case. The lack of a provision for a swift final adjudication on the obscenity question raises serious doubts of the constitutional usability of the injunction process in Texas for an obscenity situation.'" 559 F. 2d, at 1303.

[8] It accepted the panel majority's construction of Art. 4666, *i. e.*, that it was inapplicable in obscenity cases.

[9] In *Freedman*, the Court gave three reasons for holding Maryland's censorship procedures unconstitutional:

"It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination." 380 U. S., at 59–60.

[10] The dissenters also relied on the panel majority's distinction between a temporary restraint entered by a judge and one entered by an administrative censor.

to the two arguments advanced in appellants' brief: [11] first, that an "obscenity injunction" under Art. 4667 (a)(3) constitutes no greater a prior restraint than any criminal statute and, second, that the Court of Appeals erroneously held that no prior restraint of possible First Amendment materials is permissible.

## I

The Court of Appeals was quite correct in concluding both (a) that the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance,[12] and (b) that the burden of supporting

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[11] The brief is confined to an attack on the Court of Appeals' holding that Art. 4667 (a) is unconstitutional as applied to allegedly obscene material. At oral argument, appellants' counsel invited us also to review issues relating to Art. 4666 and the question whether the District Court should have abstained. Since the former contention would require us to review a construction of Art. 4666 which all members of the en banc Court of Appeals ultimately accepted, and since the latter contention was not raised in the Court of Appeals, we decline the invitation.

[12] Emphasizing the difference between a regulation touching freedom of expression and the regulation of ordinary commercial activity, in *Freedman* v. *Maryland*, the Court wrote:

"In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. 'One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it.' *Thornhill* v. *Alabama*, 310 U. S. 88, 97; see *Staub* v. *City of Baxley*, 355 U. S. 313, 319; *Saia* v. *New York*, 334 U. S. 558; *Thomas* v. *Collins*, 323 U. S. 516; *Hague* v. *CIO*, 307 U. S. 496; *Lovell* v. *City of Griffin*, 303 U. S. 444, 452–453. Standing is recognized in such cases because of the '. . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' *NAACP* v. *Button*, 371 U. S. 415, 433; see also Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75–76, 80–81, 96–104 (1960)." 380 U. S., at 56.

an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication.[13]

As the District Court and the Court of Appeals construed Art. 4667 (a), when coupled with the Texas Rules of Civil Procedure, it authorizes prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene.[14] Presumably, an exhibitor would be required to obey such an order pending review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene.[15] Such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal prosecution.

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[13] "Any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc.* v. *Sullivan*, 372 U. S., at 70; *New York Times Co.* v. *United States*, 403 U. S. [713, 714 (1971)]; *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971); *Carroll* v. *Princess Anne*, 393 U. S. 175, 181 (1968); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. [697, 716 (1931)]. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See *Speiser* v. *Randall*, 357 U. S. 513 (1958)." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 558–559 (1975).

[14] Those courts believed that a short-lived temporary restraining order could be issued on the basis of an *ex parte* showing, and that a temporary injunction of indefinite duration could be obtained on the basis of a showing of probable success on the merits.

We accept their construction of Texas law for purposes of decision. See *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204–205 (1956).

[15] Cf. *Walker* v. *City of Birmingham*, 388 U. S. 307, 317–321 (1967); *United States* v. *Mine Workers*, 330 U. S. 258, 293 (1947).

Nor does the fact that the temporary prior restraint is entered by a state trial judge rather than an administrative censor sufficiently distinguish this case from *Freedman* v. *Maryland*. "*Any* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963) (emphasis added). That a state trial judge might be thought more likely than an administrative censor to determine accurately that a work is obscene does not change the unconstitutional character of the restraint if erroneously entered.

Accordingly, we agree with the Court of Appeals' conclusion that the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of these nuisance statutes against motion picture exhibitors.

## II

Contrary to appellants' second argument, the Court of Appeals did not hold that there can never be a valid prior restraint on communicative activity. The Court of Appeals simply held that these Texas statutes were procedurally deficient, and that they authorize prior restraints that are more onerous than is permissible under *Freedman* v. *Maryland* and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975).

Because we find no merit in the contentions advanced on behalf of appellants, the judgment is affirmed.

*It is so ordered.*

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL joins, dissenting.

I would dismiss the appeal for failure to present a real and substantial controversy "of the immediacy which is an indis-

pensable condition of constitutional adjudication." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion). Alternatively, I would abstain from decision until the Texas courts interpret the challenged statute. I would not reach the merits of this "dispute" at this stage.

This Court's power of constitutional review is "most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity." *Id.*, at 503. This case quite plainly fails to satisfy that rigorous standard. Here, Texas has conceded at oral argument that the injunctive remedy of Art. 4667 (a) is not likely to be used by any Texas prosecutor.[1] In light of this concession, this case recalls *Poe*, where Mr. Justice Frankfurter concluded:

> "The fact that [the State] has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows." 367 U. S., at 508.

By passing on the constitutionality of the Texas statute, the Court ignores this wise counsel.[2]

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[1] "QUESTION: Well, what does it—why, then, do you need [this statute], if it is the equivalent of the Texas criminal law?

"MR. ZWEINER: I am not sure that we do, to be frank; but—

"QUESTION: What does it add to the criminal law. It changes the burden of proof, it deprives a person of a jury trial.

"MR. ZWEINER: I don't think it adds anything. As a matter of fact I think it is a cumbersome process and I don't know that the prosecutor after more than two rounds will ever use it again. . . ." Tr. of Oral Arg. 36–37.

[2] It is true that the State was the appellee in *Poe* and that it is the appellant here. This difference, however, should not be controlling for purposes of determining whether the dispute is a real one. Here, the challenged statute was defended in perfunctory fashion, apparently more

Moreover, the need for constitutional decision could be obviated in this case by permitting the Texas courts an opportunity to interpret Texas law. The Court today assumes (1) that "a temporary injunction of indefinite duration" could be issued against a named motion picture "on the basis of a showing of probable success on the merits," *ante*, at 316, n. 14; and (2) that an exhibitor would be subject to criminal contempt proceedings for violating such an injunction even if the motion picture is ultimately adjudged nonobscene, *ante*, at 316, and n. 15. If these assumptions are correct, the statute is obviously flawed. See *Freedman* v. *Maryland*, 380 U. S. 51 (1965). But there is ample reason to believe that the Court may be wrong in today's conjectures; indeed, there is a serious question as to whether the Texas statute even authorizes an injunction against a *named* film. Compare *ante*, at 312, and dissenting opinion of MR. JUSTICE WHITE, *post*, at 325. If such an injunction is permitted, the decision of the Texas Court of Civil Appeals in *Locke* v. *State*, 516 S. W. 2d 949 (1974), casts doubt on the assumption that it can be obtained on a showing of probable success. There, the Texas court in reviewing the validity of a temporary injunction entered against a motion picture exhibitor made a *de novo* on-the-merits determination of obscenity.[3] Are we really to believe that the trial court applies a less stringent, probable-success standard? At the very least, *Locke* demonstrates that if an injunction is

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out of a sense of duty than anything else. The State filed a nine-page brief with only three pages devoted to analysis; it derided the injunctive remedy as "cumbersom[e] and ineffectua[l]." Brief for Appellants 6.

[3] In *Locke*, the Texas court wrote as follows:

"In accordance with the requirement that an independent determination of the obscene nature of the material is made by the reviewing court, we have viewed the films introduced as exhibits below, and we find them to be obscene by any reasonable definition. The films have practically no plot or story content. . . . Their appeal is wholly to the prurient interest in sexual conduct. They are obscene according to both the Texas statutory definition and the test approved by the United States Supreme Court in Miller v. California." 516 S. W. 2d, at 954.

obtainable on such a slender showing, it is likely to enjoy a short life. It provides stark proof that only by abstaining from decision can we know whether Texas law is as the Court today "forecasts" it to be. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 499 (1941).[4] "So fragile a record is an unsatisfactory basis on which to entertain this action for declaratory relief." *Public Affairs Press* v. *Rickover*, 369 U. S. 111, 114 (1962).

In sum, I am unwilling to join the Court in "umpiring" an empty debate on a question of Texas law on which the Texas courts have not yet had an opportunity to speak. I therefore would dismiss the appeal.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The Court of Appeals invalidated Tex. Rev. Civ. Stat. Ann., Art. 4667 (a) (Vernon Supp. 1978), for what I understand to be two distinct reasons. Neither is valid, and to the extent that the Court falls into the same error, I respectfully dissent.

I

The Court of Appeals first characterized Art. 4667 (a) as a prior restraint on expression and invalidated it for this reason. I disagree. In my view, Art. 4667 (a), standing alone, intrudes no more on First Amendment values than would a criminal statute barring exhibition of obscene films in terms that would be valid under our cases.

The Court of Appeals' analysis of Art. 4667 (a), and that of this Court as well, glosses over what I take to be a crucial

[4] Equally dubious is the Court's second assumption that an exhibitor could be punished for disobeying a temporary injunction even if the motion picture shown is ultimately found nonobscene. It is an open question whether Texas in these circumstances would apply a rule analogous to that invoked in *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967), to bar a defendant from raising a First Amendment defense in an action for contempt.

feature of that law. Before an exhibitor can be found to have violated an Art. 4667 (a) injunction, there must be two quite separate judicial proceedings. First, the plaintiff must obtain temporary or permanent injunctive relief against the habitual use of the subject premises for the commercial exhibition of obscene motion pictures. Second, the exhibitor must be found in criminal or civil contempt for violating the terms of the injunction. When these separate proceedings are carefully distinguished, it becomes apparent that neither individually nor jointly do they impose an impermissible burden on the exercise of First Amendment freedoms.

The initial injunctive proceeding is both substantively and procedurally sound under our precedents. Although the lack of an actual Art. 4667 (a) injunction in the present case gives a somewhat abstract and hypothetical tone to the analysis, it seems undisputed that any injunction granted under Art. 4667 (a) will be phrased in terms of the *Miller* v. *California*, 413 U. S. 15 (1973), definition of obscenity.[1] Hence an Art. 4667 (a) injunction would not by its terms forbid the exhibition of any materials protected by the First Amendment and would impose no greater functional burden on First Amendment values than would an equivalent—and concededly

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[1] The en banc Fifth Circuit and the District Court both found that the term "obscene" in Art. 4667 (a) would be defined with reference to Tex. Penal Code Ann. § 43.21 (Supp. 1979). 587 F. 2d 159, 168, and n. 18 (1978); 404 F. Supp. 33, 39 (1975). See also *Locke* v. *State*, 516 S. W. 2d 949, 952 (Tex. Civ. App. 1974). Section 43.21, in turn, tracks nearly verbatim the *Miller* guidelines. The Fifth Circuit panel, in an aspect of its decision that was not repudiated by the Circuit en banc, held:

"The statute authorizes an injunction against the commercial manufacture, distribution or exhibition of *obscene* material only. . . . Were a Texas court to issue an overbroad injunction restricting nonobscene (and therefore protected) matter, it would exceed both its constitutional and its statutory authority." 559 F. 2d 1286, 1292 (1977) (emphasis in original).

I do not read today's decision as disputing that under Texas law a valid Art. 4667 (a) injunction will be phrased in terms of a constitutionally adequate definition of obscenity.

valid—criminal statute. It simply declares to the exhibitor that the future showing of obscene motion pictures will be punishable.[2] It is true that an Art. 4667 (a) injunction is issued by a court of law while a criminal statute is imposed by a legislature. Yet this distinction seems irrelevant for First Amendment purposes.

Of course, an exhibitor who continues to show arguably obscene motion pictures after an Art. 4667 (a) injunction has issued against him does run the risk of being held in contempt. The Court implies that this danger renders Art. 4667 (a) unconstitutional because under *Walker* v. *City of Birmingham*, 388 U. S. 307, 317–321 (1967), an exhibitor could be held in contempt even if the film is ultimately found to be nonobscene. *Ante*, at 316, and n. 15. This conclusion is plainly wrong. As I have noted, and as the majority does not dispute, an Art. 4667 (a) injunction, temporary injunction, or temporary restraining order will be phrased in terms of a constitutionally adequate definition of obscenity. Therefore, contrary to the Court's inference, the motion picture's nonobscenity would clearly defeat any contempt proceeding brought under Art. 4667 (a), since if the film were not obscene, there would be no violation of the injunction.

There remains the question of whether the procedures employed at a contempt proceeding satisfy First Amendment requirements. I believe that they do. An exhibitor who shows a film arguably violative of the injunction would likely be tried for criminal contempt. At such a proceeding the exhibitor would have the constitutional rights of any criminal defendant. In particular, the State would bear the burden of proving beyond a reasonable doubt that the film which

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[2] Indeed, the Art. 4667 (a) procedure provides greater protection to speech than would an equivalent criminal statute, since no one is punishable for violating an Art. 4667 (a) injunction unless a plaintiff has already gone to the considerable trouble of first obtaining a public nuisance injunction against the defendant.

allegedly violated the injunction was obscene.[3] Such procedures seem more than adequate to satisfy any procedural requirements that may exist with respect to criminal contempt proceedings in the First Amendment context.

The defendant might also be held in civil contempt if he refused to cease showing a specific motion picture proved to be obscene and contrary to the terms of the injunction. A civil contempt proceeding, unlike the original Art. 4667 (a) injunction, could result in jailing or fining the exhibitor until he ceased showing a film that had been publicly determined to be obscene. But such procedures would fully satisfy the requirements of our cases. Under Texas law, no one may be held in civil contempt unless he has received notice, in the form of an order to show cause, and a hearing on the charge against him. *E. g., Ex parte Mouille*, 572 S. W. 2d 60, 62 (Tex. Civ. App. 1978). The burden of bringing civil contempt charges is on the party seeking to suppress the exhibition; presumably, that party as plaintiff also bears the burden of showing noncompliance with the injunction, and in particular of proving that the exhibitor has shown obscene films. Since contempt proceedings are held before a court, a civil contempt order will not issue until there has been a final judicial determination that the defendant has exhibited and

[3] The Fifth Circuit majority expressed some doubt as to whether the State will have the burden of proof of showing that the film is obscene. 587 F. 2d, at 171, n. 23, citing *Railroad Comm'n* v. *Sample*, 405 S. W. 2d 338, 343 (Tex. 1966). The *Sample* case was a challenge to an order of the State Railroad Commission, not a contempt proceeding; it stands at most for the proposition that in Texas an order to show cause does not conclusively establish which party bears the burden of proof. The case does not establish that a party receiving an order to show cause why he should not be held in criminal contempt bears the burden of proof on any element of the contempt. To the contrary, obscenity is one element of the injunction, and if the State has the burden of showing violation of the injunction beyond a reasonable doubt, it follows that the State as a matter of due process has the burden of showing that the particular film shown was obscene.

continues to exhibit obscene films. And even then the exhibitor could purge his contempt by ceasing to exhibit such films.

The Court of Appeals and the Court, therefore, too easily equate an injunction against the exhibition of unnamed, obscene films with a typical "prior restraint." The Art. 4667 (a) injunction does, in a sense, "restrain" future speech by declaring punishable future exhibitions of obscene motion pictures. But in this weak sense of the term criminal obscenity statutes would also be considered "prior restraints." Prior restraints are distinct from, and more dangerous to free speech than, criminal statutes because, through caprice, mistake, or purpose, the censor may forbid speech which is constitutionally protected, and because the speaker may be punished for disobeying the censor even though his speech was protected. Those dangers are entirely absent here. An injunction against the showing of unnamed obscene motion pictures does not and cannot bar the exhibitor from showing protected material, nor can the exhibitor be punished, through contempt proceedings, for showing such material. The Art. 4667 (a) injunction, in short, does not impose a traditional prior restraint. On the contrary, it seems to me functionally indistinguishable from a criminal obscenity statute. Since an appropriately worded criminal statute is constitutionally valid, I believe that Art. 4667 (a) is valid also.

## II

The second reason given by the Court of Appeals for invalidating Art. 4667 (a) and apparently adopted by this Court, was the "failure to provide the safeguards mandated by" *Freedman* v. *Maryland*, 380 U. S. 51 (1965), and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975). Those cases held that injunctions against showing allegedly obscene films are invalid unless (1) the burdens of instituting proceedings and of proving the material is obscene are on the censor; (2) the restraint prior to judicial review continues

only for a limited time and only to preserve the status quo; and, (3) there is an assurance of prompt final judicial determination of the films' obscenity.

I fail to see, however, how the *Freedman* restraints are relevant to the injunction contemplated by Art. 4667 (a). The *Freedman* restraints are wholly appropriate with respect to injunctions against specific, named films, but the injunction contemplated by Art. 4667 (a) is one directed against the future showing of *unnamed* obscene motion pictures. Because the films enjoined are unnamed, a final judicial determination of obscenity is logically impossible prior to or at the time the injunction issues. As I have said, an Art. 4667 (a) injunction no more restrains the showing of *particular* films than would a similarly worded criminal statute.

The Court of Appeals referred to the Texas Rules of Civil Procedure and declared that injunctions under those Rules could be issued without compliance with *Freedman* requirements. I would agree that the Texas procedures for enjoining the showing of named films must comply with the First Amendment requirements set out in our cases, but I fail to perceive why the inadequacy of the Texas procedures in this respect invalidates Art. 4667 (a), a separate statutory provision, contemplating only injunctions against unnamed films.

In this light, striking down Art. 4667 (a) is wholly gratuitous, and I respectfully dissent.

# DEPOSIT GUARANTY NATIONAL BANK OF JACKSON, MISSISSIPPI *v.* ROPER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-904. Argued October 2, 1979—Decided March 19, 1980

Respondents, holders of credit cards issued by petitioner bank, sued petitioner for damages in Federal District Court, seeking to represent both their own interests and those of a class of similarly situated credit card customers. The complaint, based on the National Bank Act, alleged that usurious finance charges had been made against the accounts of respondents and the putative class. The District Court denied respondents' motion to certify the class, ruling that the circumstances did not meet all the requirements of Federal Rule of Civil Procedure 23 (b)(3). After the Court of Appeals denied respondents' motion for interlocutory appeal, petitioner tendered to each respondent the maximum amount that each could have recovered, but respondents refused to accept the tender. The District Court, over respondents' objections, then entered judgment in their favor on the basis of the tender and dismissed the action, the amount of the tender being deposited by petitioner in the court's registry. Respondents thereafter sought review of the class certification ruling, and the Court of Appeals concluded, *inter alia*, that the case had not been mooted by the entry of judgment in respondents' favor and reversed the adverse certification ruling.

*Held:* Neither petitioner's tender nor the District Court's entry of judgment in favor of respondents over their objections mooted their private case or controversy, and their individual interest in the litigation—as distinguished from whatever may be their representative responsibilities to the putative class—is sufficient to permit their appeal of the adverse certification ruling. Pp. 331-340.

(a) In an appropriate case appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying Art. III's case-or-controversy requirements. Here, neither the rejected tender nor the dismissal of the action over respondents' objections mooted their claim on the merits so long as they retained an economic interest in class certification. Pp. 332-335.

(b) The denial of class certification is an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after

the entry of final judgment. The denial of certification stands as an adjudication of one of the issues litigated. Respondents have asserted throughout this appellate litigation a continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails. Thus, they are entitled to have this portion of the District Court's judgment reviewed. To deny the right to appeal simply because the defendant has sought to "buy off" the individual claims of the named plaintiffs would be contrary to sound judicial administration. Pp. 336–340.

578 F. 2d 1106, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. REHNQUIST, J., *post*, p. 340, and STEVENS, J., *post*, p. 342, filed concurring opinions. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 344. POWELL, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 344.

*William F. Goodman, Jr.*, argued the cause for petitioner. With him on the briefs was *Vardaman S. Dunn*.

*Champ Lyons, Jr.*, argued the cause for respondents. With him on the brief were *Frederick G. Helmsing* and *W. Roberts Wilson*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection, moots the case and terminates their right to appeal the denial of class certification.

I

Respondents, holders of credit cards issued on the "Bank-Americard" plan by petitioner Deposit Guaranty National Bank, sued the bank in the United States District Court for the Southern District of Mississippi, seeking to represent both

their own interests and those of a class of similarly aggrieved customers. The complaint alleged that usurious finance charges had been made against the accounts of respondents and a putative class of some 90,000 other Mississippi credit card holders.

Respondents' cause of action was based on provisions of the National Bank Act, Rev. Stat. §§ 5197, 5198, as amended, 12 U. S. C. §§ 85, 86. Section 85 permits banks within the coverage of the Act to charge interest "at the rate allowed by the laws of the State, Territory, or District where the bank is located." In a case where a higher rate of interest than allowed has been "knowingly" charged, § 86 allows a person who has paid the unlawful interest to recover twice the total interest paid.[1]

The modern phenomenon of credit card systems is largely dependent on computers, which perform the myriad accounting functions required to charge each transaction to the customer's account. In this case, the bank's computer was programmed so that, on the billing date, it added charges, subtracted credits, added any finance charges due under the BankAmericard plan, and prepared the customers' statements. During the period in question, the bank made a monthly service charge of 1½% on the unpaid balance of each account. However, customers were allowed 30 days within which to pay accounts without any service charge. If payment was not received within that time, the computer added to the customer's next bill 1½% of the unpaid portion of the prior bill, which was shown as the new balance. The actual finance charges paid by each customer varied depending on the stream of transactions and the repayment plan selected. In addition, the effective annual interest rate paid by a customer would vary because the same 1½% service charge was assessed

[1] Respondents' complaint also alleged a cause of action based on the Truth in Lending Act, 15 U. S. C. § 1601 *et seq.*, but that claim was dismissed with prejudice at respondents' request.

against the unpaid balance no matter when the charged transactions occurred within the 30–60-day period prior to the billing date. This 1½% monthly service charge is asserted to have been usurious because under certain circumstances the resulting effective annual interest rate allegedly exceeded the maximum interest rate permitted under Mississippi law.

The District Court denied respondents' motion to certify the class, ruling that the circumstances did not meet all the requirements of Federal Rule of Civil Procedure 23 (b)(3).[2] The District Court certified the order denying class certification for discretionary interlocutory appeal, pursuant to 28 U. S. C. § 1292 (b); the proceedings were stayed for 30 days pending possible appellate review of the denial of class certification.

The United States Court of Appeals for the Fifth Circuit denied respondents' motion for interlocutory appeal. The bank then tendered to each named plaintiff, in the form of an "Offer of Defendants to Enter Judgment as by Consent and Without Waiver of Defenses or Admission of Liability," the maximum amount that each could have recovered. The amounts tendered to respondents Roper and Hudgins were $889.42 and $423.54, respectively, including legal interest and court costs. Respondents declined to accept the tender and made a counteroffer of judgment in which they attempted to reserve the right to appeal the adverse class certification ruling. This counteroffer was declined by the bank.

[2] The District Court found that the requirements of Rule 23 (b)(3) were not met because the putative class representatives had failed to establish the predominance of questions of law and fact common to class members, and because a class action was not shown to be a superior method of adjudication due to (1) the availability of traditional procedures for prosecuting individual claims in Mississippi courts; (2) the "horrendous penalty," which could result in "destruction of the bank" if claims were successfully aggregated; (3) the substantive law of Mississippi which views the aggregation of usury claims as undesirable; and (4) the tremendous burden of handling 90,000 claims, particularly if counterclaims were filed.

Based on the bank's offer, the District Court entered judgment in respondents' favor, over their objection, and dismissed the action. The bank deposited the amount tendered into the registry of the court, where it remains. At no time has any putative class member sought to intervene either to litigate the merits or to appeal the certification ruling. It appears that by the time the District Court entered judgment and dismissed the case, the statute of limitations had run on the individual claims of the unnamed class members.[3]

When respondents sought review of the class certification ruling in the Court of Appeals, the bank argued that the case had been mooted by the entry of judgment in respondents' favor. In rejecting the bank's contention, the court relied in part on *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), in which we held that a member of the putative class could appeal the denial of class certification by intervention, after entry of judgment in favor of the named plaintiff, but before the statutory time for appeal had run. *Roper* v. *Consurve, Inc.*, 578 F. 2d 1106 (CA5 1978). Two members of the panel read Rule 23 as providing for a fiduciary-type obligation of the named plaintiffs to act in a representative capacity on behalf of the putative class by seeking certification at the outset of the litigation and by appealing an adverse certification ruling. In that view, the District Court also had a responsibility to ensure that any dismissal of the suit of the named plaintiffs did not prejudice putative class members. One member of the panel, concurring specially, limited the ruling on mootness to the circumstances of the case, *i. e.*, that, after filing of a class action, the mere tender of an offer of settlement to the named plaintiffs, without ac-

[3] Reversal of the District Court's denial of certification by the Court of Appeals may relate back to the time of the original motion for certification for the purposes of tolling the statute of limitations on the claims of the class members. See *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977).

ceptance, does not moot the controversy so as to prevent the named plantiffs from appealing an adverse certification ruling.

Having rejected the bank's mootness argument, the Court of Appeals reviewed the District Court's ruling on the class certification question. It concluded that all the requisites of Rule 23 had been satisfied and accordingly reversed the adverse certification ruling; it remanded with directions to certify the class and for further proceedings.

Certiorari was sought to review the holdings of the Court of Appeals on both mootness and class certification. We granted the writ, limited to the question of mootness, to resolve conflicting holdings in the Courts of Appeals.[4] 440 U. S. 945.

## II

We begin by identifying the interests to be considered when questions touching on justiciability are presented in the class-action context. First is the interest of the named plaintiffs: their personal stake in the substantive controversy and their related right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims. A separate consideration, distinct from their private interests, is the responsibility of named plaintiffs to represent the collective interests of the putative class. Two other interests are implicated: the rights of putative class members as potential intervenors, and the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it.

The Court of Appeals did not distinguish among these distinct interests. It reviewed all possible interests that in its view had a bearing on whether an appeal of the denial of certification should be allowed. These diverse interests are interrelated, but we distinguish among them for purposes

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[4] *E. g., Winokur* v. *Bell Federal Savings & Loan Assn.*, 560 F. 2d 271 (CA7 1977), cert. denied, 435 U. S. 932 (1978).

of analysis, and conclude that resolution of the narrow question presented requires consideration only of the private interest of the named plaintiffs.

A

The critical inquiry, to which we now turn, is whether respondents' individual and private case or controversy became moot by reason of petitioner's tender or the entry of judgment in respondents' favor. Respondents, as holders of credit cards issued by the bank, claimed damages in their private capacities for alleged usurious interest charges levied in violation of federal law. Their complaint asserted that they had suffered actual damage as a result of illegal acts of the bank. The complaint satisfied the case-or-controversy requirement of Art. III of the Constitution.

As parties in a federal civil action, respondents exercised their option as putative members of a similarly situated cardholder class to assert their claims under Rule 23. Their right to assert their own claims in the framework of a class action is clear. However, the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims. Should these substantive claims become moot in the Art. III sense, by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs.

The factual context in which this question arises is important. At no time did the named plaintiffs accept the tender in settlement of the case; instead, judgment was entered in their favor by the court without their consent and the case was dismissed over their continued objections.[5] Neither the

[5] We note that Rule 23 (e) prescribes certain responsibilities of a district court in a case brought as a class action: once a class is certified, a class action may not be "dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Conceivably, there also may be circumstances, which need not be defined here,

rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification. Although a case or controversy is mooted in the Art. III sense upon payment and satisfaction of a final, unappealable judgment, a decision that is "final" for purposes of appeal does not absolutely resolve a case or controversy until the time for appeal has run. Nor does a confession of judgment by defendants on less than all the issues moot an entire case; other issues in the case may be appealable. We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification.

Congress has vested appellate jurisdiction in the courts of appeals for review of final decisions of the district courts. 28 U. S. C. § 1291. Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U. S. 204 (1939); *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645 (1934); *Corning* v. *Troy Iron & Nail Factory*, 15 How. 451 (1854); 9 J. Moore, Federal Practice ¶ 203.06 (2d ed. 1975). The rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the

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where the district court has a responsibility, prior to approval of a settlement and its dismissal of the class action, to provide an opportunity for intervention by a member of the putative class for the purpose of appealing the denial of class certification. Such intervention occurred in *United Airlines, Inc.* v. *McDonald, supra.*

jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.[6]

An illustration of this principle in practice is *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939). In that case, respondents sued petitioners for infringement of a patent. In such a suit, the defense may prevail either by successfully attacking the validity of the patent or by successfully defending the charge of infringement. In *Electrical Fittings* the decree of the District Court adjudged the patent valid but dismissed the complaint for failure to prove infringement. The respondents did not appeal, but petitioners sought review in the Court of Appeals of so much of the decree as adjudicated the patent valid. Respondents filed a motion to dismiss the appeal "based on the ground that the appeal can raise no questions not already moot because of the fact that the [petitioners] have already been granted in the dismissal of the bill all the relief to which they are entitled." 100 F. 2d 403, 404 (CA2 1938). The Court of Appeals dismissed the appeal on this ground after ruling that the decree of the District Court would not in subsequent suits, as a matter of collateral estoppel or otherwise, influence litigation on the issue of the patent's validity. On review here, this Court did not question the view that the ruling on patent validity would

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[6] The dissent construes the notice of appeal as a complete abandonment by respondents of their Art. III personal stake in the appeal. *Post*, at 346. Such is not the case. Indeed, the appeal was taken by the named plaintiffs, although its only purpose was to secure class certification; throughout this litigation, respondents have asserted as their personal stake in the appeal their desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation. See Plaintiffs-Appellants' Brief in Opposition to Motion to Dismiss Appeal and Reply Brief in No. 76-3600 (CA5), pp. 4, 12, 16, 17.

have no effect on subsequent litigation. Nevertheless, a unanimous Court allowed the appeal to reform the decree:

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree. But here the decree itself purports to adjudge the validity of [the patent], and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction, as we have held this court has, to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree." 307 U. S., at 242 (footnotes omitted).

Although the Court limited the appellate function to reformation of the decree, the holding relevant to the instant case was that the federal courts retained jurisdiction over the controversy notwithstanding the District Court's entry of judgment in favor of petitioners. This Court had the question of mootness before it, yet because policy considerations permitted an appeal from the District Court's final judgment and because petitioners alleged a stake in the outcome, the case was still live and dismissal was not required by Art. III. The Court perceived the distinction between the definitive mootness of a case or controversy, which ousts the jurisdiction of the federal courts and requires dismissal of the case, and a judgment in favor of a party at an intermediate stage of litigation, which does not in all cases terminate the right to appeal.[7]

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[7] In a sense, the petitioner in *Electrical Fittings* sought review of the District Court's procedural error. The District Court was correct in inquiring fully into the validity of the patent, *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U. S. 327, 330 (1945), but was incorrect to ad-

B

We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment.[8] The denial of class certification stands as an adjudication of one of the issues litigated. As in *Electrical Fittings*, the respondents here, who assert a continuing stake in the outcome of the appeal, were entitled to have this portion of the District Court's judgment reviewed. We hold that the Court of Appeals had jurisdiction to entertain the appeal only to review the asserted procedural error, not for the purpose of passing on the merits of the substantive controversy.

Federal appellate jurisdiction is limited by the appellant's personal stake in the appeal. Respondents have maintained throughout this appellate litigation that they retain a continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails. See n. 6, *supra*. This individual interest may be satisfied fully once effect is given to the decision of the Court of Appeals setting aside what it held

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judge the patent valid after ruling that there had been no infringement. By doing so, the District Court had decided a hypothetical controversy, *Altvater* v. *Freeman*, 319 U. S. 359, 363 (1943); yet petitioners could take the appeal to correct this error because there had been an adverse decision on a litigated issue, they continued to assert an interest in the outcome of that issue, and for policy reasons this Court considered the procedural question of sufficient importance to allow an appeal.

[8] In *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), we held that the class certification ruling did not fall within that narrow category of circumstances where appeal was allowed prior to final judgment as a matter of right under 28 U. S. C. § 1291. However, our ruling in *Livesay* was not intended to preclude motions under 28 U. S. C. § 1292 (b) seeking discretionary interlocutory appeal for review of the certification ruling. See 437 U. S., at 474–475. In some cases such an appeal would promise substantial savings of time and resources or for other reasons should be viewed hospitably.

to be an erroneous District Court ruling on class certification. In *Electrical Fittings*, the petitioners asserted a concern that their success in some unspecified future litigation would be impaired by *stare decisis* or collateral-estoppel application of the District Court's ruling on patent validity. This concern supplied the personal stake in the appeal required by Art. III. It was satisfied fully when the petitioners secured an appellate decision eliminating the erroneous ruling from the decree. After the decree in *Electrical Fittings* was reformed, the then unreviewable judgment put an end to the litigation, mooting all substantive claims. Here the proceedings after remand may follow a different pattern, but they are governed by the same principles.

We cannot say definitively what will become of respondents' continuing personal interest in their own substantive controversy with the petitioner when this case returns to the District Court. Petitioner has denied liability to the respondents, but tendered what they appear to regard as a "nuisance settlement." Respondents have never accepted the tender or judgment as satisfaction of their substantive claims. Cf. *Cover* v. *Schwartz*, 133 F. 2d 541 (CA2 1942). The judgment of the District Court accepting petitioner's tender has now been set aside by the Court of Appeals. We need not speculate on the correctness of the action of the District Court in accepting the tender in the first instance, or on whether petitioner may now withdraw its tender.

Perhaps because the question was not thought to be open to doubt, we have stated in the past, without extended discussion, that "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff. . . ." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469 (1978). In *Livesay*, we unanimously rejected the argument, advanced in favor of affording prejudgment appeal *as a matter of right*, that an adverse class certification ruling came within the "collateral order" exception to the final-judgment rule. The appealability of the class certifica-

tion question *after* final judgment on the merits was an important ingredient of our ruling in *Livesay*. For that proposition, the Court cited *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977). That case involved, as does this, a judgment entered on the merits in favor of the named plaintiff. The *McDonald* Court assumed that the named plaintiff would have been entitled to appeal a denial of class certification.

The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise.[9] Plainly there has been a growth of litigation stimulated by contingent-fee agreements and an enlargement of the role this type of fee arrangement has played in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost. The prospect of such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys.[10] For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the "private attorney general" for the vindication of legal rights; obviously this development has been facilitated by Rule 23.

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[9] A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled $1,006.00. Such plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis. This, of course, is a central concept of Rule 23.

[10] This case does not raise any question as to the propriety of contingent-fee agreements.

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences.

A district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings.[11] To deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement. It would be in the interests of a class-action defendant to forestall any appeal of denial of class certification if that could be accomplished by tendering the individual damages claimed by the named plaintiffs. Permitting appeal of the district court's certification ruling—either at once by interlocutory appeal, or after entry of judgment on the merits—also minimizes problems raised by "forum shopping" by putative class

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[11] See A. Miller, An Overview of Federal Class Actions: Past, Present, and Future 12 (Federal Judicial Center 1977).

representatives attempting to locate a judge perceived as sympathetic to class actions.

That small individual claims otherwise might be limited to local and state courts rather than a federal forum does not justify ignoring the overall problem of wise use of judicial resources. Such policy considerations are not irrelevant to the determination whether an adverse procedural ruling on certification should be subject to appeal at the behest of named plaintiffs. Courts have a certain latitude in formulating the standards that govern the appealability of procedural rulings even though, as in this case, the holding may determine the absolute finality of a judgment, and thus, indirectly, determine whether the controversy has become moot.

We conclude that on this record the District Court's entry of judgment in favor of named plaintiffs over their objections did not moot their private case or controversy, and that respondents' *individual* interest in the litigation—as distinguished from whatever may be their representative responsibilities to the putative class [12]—is sufficient to permit their appeal of the adverse certification ruling.

*Affirmed.*

MR. JUSTICE REHNQUIST, concurring.

I write briefly to state what seems to me to be sufficient differences between this case and *United States Parole Comm'n* v. *Geraghty*, *post*, p. 388, to allow the appeal of the denial of class certification in this case, and to dismiss the attempted appeal of the same question in *Geraghty* as moot. If I were writing on a clean slate, I might well resolve both these cases against the respondents. But the Court today has not cleaned the slate or been successful in formulating any sound princi-

[12] Difficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification; this case does not require us to reach these questions.

ples to replace what seem to me to be the muddled and inconsistent ones of the past. Compare *Sosna* v. *Iowa*, 419 U. S. 393 (1975), with *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976); *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393 (1977), with *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 430 (1976); *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), with *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975); and now this case, with *United States Parole Comm'n* v. *Geraghty*.

Article III, and this Court's precedents in *Jacobs*, *supra*, and *Spangler*, *supra*, require dismissal of the action in *Geraghty* because there is simply no individual interest remaining, no certified class or intervenors to supply that interest, and the action is not within that "narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" *Gerstein* v. *Pugh*, 420 U. S. 103, 110, n. 11 (1975). The facts in this case, in contrast, fit within the framework of the precedents permitting continuation of the action.

The distinguishing feature here is that the defendant has made an *unaccepted* offer of tender in settlement of the individual putative representative's claim. The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i. e.*, relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable. Since adversity is in fact retained, and this set of facts fits within a "narrow class of cases" where a contrary rule would lead to the "reality" that "otherwise the issue would evade review," I think our precedents provide for the main-

tenance of this action. *Sosna, supra,* at 402, n. 11; *Gerstein, supra.* Accordingly, I join in the opinion of the Court in this case and in MR. JUSTICE POWELL's dissent in *Geraghty.*

MR. JUSTICE STEVENS, concurring.

In his dissenting opinion MR. JUSTICE POWELL states that, because the District Court erroneously refused to certify the class and because no member of the class attempted to intervene, the respondents "are the only plaintiffs arguably present in court." *Post,* at 346. This position is apparently based on the notion that, unless class members are present for all purposes (and thus may be liable for costs, bound by the judgment, etc.), they cannot be considered "present" for any purpose. I respectfully disagree. In my opinion, when a proper class-action complaint is filed, the absent members of the class should be considered parties to the case or controversy at least for the limited purpose of the court's Art. III jurisdiction. If the district judge fails to certify the class, I believe they remain parties until a final determination has been made that the action may not be maintained as a class action. Thus, the continued viability of the case or controversy, as those words are used in Art. III, does not depend on the district judge's initial answer to the certification question; rather, it depends on the plaintiffs' right to have a class certified.[1]

[1] There is general agreement that, if a class has been properly certified, the case does not become moot simply because the class representative's individual interest in the merits of the litigation has expired. In such a case the absent class members' continued stake in the controversy is sufficient to maintain its viability under Art. III. In a case in which certification has been denied by the district court, however, a court of appeals cannot determine whether the members of the class continue to have a stake in the outcome until it has determined whether the action can properly be maintained as a class action. If it is not a proper class action, then the entire case is moot. If, on the other hand, the district court's refusal to certify the class was erroneous, I believe there remains

Accordingly, even if the named plaintiff's personal stake in the lawsuit is effectively eliminated,[2] no question of mootness arises simply because the remaining adversary parties are unnamed.[3] Rather, the issue which arises is whether the

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a live controversy which the courts have jurisdiction to resolve under Art. III.

I recognize that there is tension between the approach I have suggested and the Court's *sua sponte* decision in *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128. See also *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 430. As MR. JUSTICE BLACKMUN points out in *United States Parole Comm'n* v. *Geraghty*, *post*, at 400, n. 7, that case is distinguishable from this case because it involved an attempt to litigate the merits of an appeal on behalf of an improperly certified class. I agree that the Court could not properly consider the merits until the threshold question of whether a class should have been certified was resolved. However, I disagree with the Court's conclusion that the entire action had to be dismissed as moot. In my view, the absent class members remained sufficiently present so that a remand on the class issue would have been a more appropriate resolution.

Just as absent class members whose status has not been fully adjudicated are not "present" for purposes of litigating the merits of the case, I would not find them present for purposes of sharing costs or suffering an adverse judgment. If a class were ultimately certified, the class members would, of course, retain the right to opt out.

[2] I agree with the Court's determination in this case and in *Geraghty* that the respective named plaintiffs continue to have a sufficient personal stake in the outcome to satisfy Art. III requirements. See *ante*, at 340; *Geraghty*, *post*, at 404.

[3] The status of unnamed members of an uncertified class has always been difficult to define accurately. Such persons have been described by this Court as "parties in interest," see *Smith* v. *Swormstedt*, 16 How. 288, 303; as "interested parties," see *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 366; or as "absent parties," see *Hansberry* v. *Lee*, 311 U. S. 32, 42–45. There is nothing novel in my suggestion that such "absent parties" may be regarded as parties for the limited purpose of analyzing the status of the case or controversy before a certification order has been entered. Indeed, since the concept of "absent parties" was developed long before anyone conceived of certification orders, I find it difficult to understand why the existence of a case or controversy in a constitutional sense should depend on compliance with a procedural requirement that was first created in 1966.

named plaintiff continues to be a proper class representative for the purpose of appealing the adverse class determination. Cf. *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 403–406; *United States Parole Comm'n* v. *Geraghty*, *post*, at 407. In my judgment, in this case, as in *Geraghty*, the named plaintiffs clearly remained appropriate representatives of the class at least for that limited purpose.[4]

I therefore join the opinion of the Court.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment because, under *United States Parole Comm'n* v. *Geraghty*, *post*, p. 388, respondents' appeal of the order denying class certification is not moot. I agree with the Court that the ruling on a class certification motion stands as a litigated issue which does not become moot just because the named plaintiff's suit on the merits is mooted. I would not limit appealability of this procedural motion, however, to situations where there is a possibility that the named plaintiff will be able to recover attorney's fees from either the defendant or the fund awarded to the class.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

Respondents are two credit card holders who claim that petitioner charged them usurious interest in violation of the National Bank Act and Mississippi law.[1] They filed this

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[4] My view of the jurisdictional issue would not necessarily enlarge the fiduciary responsibilities of the class representative as MR. JUSTICE POWELL suggests, see *post*, at 358–359, n. 21. In any event, I do not share the concern expressed in his opinion about the personal liability of a class representative for costs and attorney's fees if the case is ultimately lost. Anyone who voluntarily engages in combat—whether in the courtroom or elsewhere—must recognize that some of his own blood may be spilled.

[1] Jurisdiction was premised on the National Bank Act, 12 U. S. C. §§ 85, 86, which adopts the interest limits set by state law, and on 28 U. S. C. § 1355.

action late in 1971 to recover those charges plus a penalty equal to the same amount, for individual totals of $683.30 and $322.70. App. 59. Respondents also sought relief on behalf of a class alleged to include 90,000 persons with claims aggregating $12 million. After four years of litigation, the District Court denied respondents' motion for class certification. Seven months later, petitioner tendered to respondents the full amount of their individual claims plus legal interest and court costs. Over respondents' objection, the District Court entered final judgment in their favor. Petitioner then deposited the full amount due with the Clerk of the Court.

No one disputes that the petitioner has tendered everything that respondents could have recovered from it in this action. Nevertheless, the Court of Appeals for the Fifth Circuit rejected petitioner's suggestion of mootness and reversed the denial of class certification. This Court affirms the judgment of the Court of Appeals, after finding that respondents retain a personal stake in sharing the expense of litigation with members of the putative class. *Ante,* at 334, n. 6, 336. This speculative interest simply will not sustain the jurisdiction of an Art. III court under established and controlling precedents. Accordingly, I dissent.

## I

Although there are differences, this case is similar to *United States Parole Comm'n* v. *Geraghty, post,* p. 388, in one important respect: both require us to decide whether putative class representatives may appeal the denial of class certification when they can derive no benefit whatever from the relief sought in the action. Here, as in *Geraghty,* the District Court refused to certify a class. In this case, however, the Court recognizes established Art. III doctrine. It states that the "right . . . to employ Rule 23" is a "procedural right only, ancillary to the litigation of substantive claims." *Ante,* at 332. It also agrees that a federal court "retains no juris-

diction over the controversy" when the parties' "substantive claims become moot in the Art. III sense." *Ibid.* Moreover, the Court acknowledges the familiar principle that a party who has no personal stake in the outcome of an action presents no case or controversy cognizable in a federal court of appeals. *Ante*, at 334, 336. These are indeed the dispositive principles. My disagreement is with the way in which the Court applies them in this case. In my view, these principles unambiguously require a finding of mootness.

A

Since no class has been certified and no one has sought to intervene, respondents are the only plaintiffs arguably present in court. Yet respondents have no continuing interest in the injuries alleged in their complaint. They sought only damages; those damages have been tendered in full.[2] Respondents make no claim that success on the certification motion would entitle them to additional relief of any kind from the petitioner.[3] Their personal claims to relief have been abandoned so completely that no appeal was taken in their own names. The notice of appeal filed with the District Court recites that respondents appeal only "on behalf of all others similarly situated. . . ." App. 63.

This in itself is compelling evidence that respondents have no interest in the "individual and private case or controversy" relied on by the Court today. *Ante*, at 332. But even without such evidence, this and other courts routinely have held that

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[2] Although respondents also asked for attorney's fees, their complaint shows that fees were to be granted only from the damages ultimately awarded to them or the class. App. 13–14. There is no possibility of prospective relief because the Mississippi usury statute was amended in 1974 to authorize, *inter alia*, the charges at issue in this case. 1974 Miss. Gen. Laws, ch. 564, § 7; see Miss. Code Ann. § 75–17–1 (6) (Supp. 1979).

[3] Neither the Court nor the respondents have asserted that the petitioner's tender fails to include all costs and fees for which it could be held liable. See Part II–B, *infra*.

a tender of full relief remedies a plaintiff's injuries and eliminates his stake in the outcome. *California* v. *San Pablo & Tulare R. Co.*, 149 U. S. 308, 313–314 (1893); *Drs. Hill & Thomas Co.* v. *United States*, 392 F. 2d 204 (CA6 1968) (*per curiam*); *Lamb* v. *Commissioner*, 390 F. 2d 157 (CA2 1968) (*per curiam*); *A. A. Allen Revivals, Inc.* v. *Campbell*, 353 F. 2d 89 (CA5 1965) (*per curiam*). It is the tender itself that moots the case whether or not a judgment is entered. *Ibid.* Thus, the law is clear that a federal court is powerless to review the abstract questions remaining in a case when the plaintiff has refused to accept a proffered settlement that fully satisfies his claims.

I know of no authority remotely suggesting that the result should differ because the District Court has entered a judgment in favor of respondents instead of dismissing their lawsuit as moot.[4] It is certainly true, as the Court observes, that the entry of judgment in favor of a party does not in itself moot his case. *Ante*, at 332–333. There never has been any doubt that a party may appeal those aspects of a generally favorable judgment that affect him adversely. See 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3902 (1976); 9 J. Moore, Federal Practice ¶ 203.06 (2d ed. 1975). But the requirement of adverse effect is more than a rule "of federal appellate practice." *Ante*, at 333. As we have held repeatedly, and as the Court concedes, *ante*, at 334, 336, Art. III itself requires a live controversy in which a personal stake is at issue "throughout the entirety of the litigation." *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975).

It is this constitutional limitation, and not any rule of practice, that has impelled federal courts uniformly to require a

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[4] The "statutory right" to appeal, *ante*, at 333, itself cannot supply a personal stake in the outcome, for Congress cannot abrogate Art. III limitations on the jurisdiction of the federal courts. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 100 (1979).

showing of continuing adverse effect in order to confer "standing to appeal." *Barry* v. *District of Columbia Bd. of Elections*, 188 U. S. App. D. C. 432, 433, 580 F. 2d 695, 696 (1978); 15 Wright, Miller, & Cooper, *supra*, § 3902; see *Altvater* v. *Freeman*, 319 U. S. 359 (1943); *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939); *Kapp* v. *National Football League*, 586 F. 2d 644, 650 (CA9 1978); *Cover* v. *Schwartz*, 133 F. 2d 541 (1942), cert. denied, 319 U. S. 748 (1943).[5] As these cases show, the requirements of Art. III are not affected by the "factual context" in which a suggestion of mootness arises. See *ante*, at 332. Whatever the context, Art. III asks but a single question: Is there a continuing controversy between adverse parties who retain the requisite stake in the outcome of the action?

*Electrical Fittings Corp.* v. *Thomas & Betts Co.*, *supra*, is the case primarily relied upon by the Court. It provides little or no support for today's ruling. In *Electrical Fittings*, a limited appeal was allowed because the petitioner himself was prejudiced by the inclusion of an unnecessary and adverse finding in a generally favorable decree. See *ante*, at 337.

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[5] *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), are not to the contrary. Incidental dictum in both cases stated that the denial of class certification is subject to appellate review after final judgment at the behest of the named plaintiffs. Neither case discussed mootness, and neither analyzed the proposition in any way. Indeed, the only authority cited in *Coopers & Lybrand* was *United Airlines*, see 437 U. S., at 469, and the only authority cited in *United Airlines* was a concession made by the defendant and a list of cases from the Courts of Appeals, not one of which dealt with a suggestion of mootness in an analogous situation, see 432 U. S., at 393, and n. 14. Such statements, casually enunciated without a word of explanation in opinions dealing with unrelated legal questions, are not controlling or even persuasive when they are shown on further reflection to have been inconsistent with settled law. As the Court agrees today, neither case creates an exception to the fundamental rule that "[f]ederal appellate jurisdiction is limited by the appellant's personal stake in the appeal." *Ante*, at 336.

Here, the existence of the District Court's order denying certification has no effect whatever on the respondents. Thus, the personal stake that justified the *Electrical Fittings* appeal is not present in this case. Absent such a stake, it is simply irrelevant that "policy considerations" sometimes may favor an appeal from "a procedural ruling, collateral to the merits of a litigation." Nor is it significant that the ruling "stands as an adjudication of one of the issues litigated." *Ante,* at 335, 336. Collateral rulings—like other rulings—may be appealed only when the requirements of Art. III are satisfied.

B

After recognizing that the right to appeal is subject to the "jurisdictional limitations of Art. III," the Court agrees that only a "party [who] retains a stake in the appeal [can satisfy] the requirements of Art. III." *Ante,* at 334; see *ante,* at 336. The Court also agrees that respondents have no remaining stake in "the merits of the substantive controversy." *Ibid.* Nevertheless, it holds that respondents retain a personal stake in this appeal because they "desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation." *Ante,* at 334, n. 6; see *ante,* at 336.[6] This conclusion is neither legally sound nor supported by the record.

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[6] The Court also mentions that "[t]he use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs. . . ." *Ante,* at 338. But any such advantages cannot accrue to these respondents, who will not be litigating their own claims on remand. Indeed, the Court refers to respondents in this context only to point out that their total damages were so small that they "would be unlikely to obtain legal redress at an acceptable cost" if they could not do so by means of a class action. *Ante,* at 338, n. 9. We may assume that respondents had some interest in the class-action procedure as a means of interesting their lawyers in the case or obtaining a satisfactory

The Court fails to identify a single item of expense, chargeable to the petitioner, that was incurred by respondents before the petitioner's tender. Similarly, respondents have been conspicuously vague in identifying the "fees and expenses" relied upon as supplying the adverse interest essential to a live controversy.[7] The only expense mentioned by respondents, apart from court costs included in the petitioner's tender, is not a present obligation at all. It is an offer to provide security for costs in the event a class ultimately is certified. Brief for Respondents 33; App. 78. Nor does the attorney's fee arrangement in this case create any obligation, present or future, that can be affected by the certification of a class. Respondents' complaint identifies the fee to be paid, subject to court approval, as "twenty-five per cent (25%)" of the amount of the final judgment. *Id.*, at 14, 16.[8] No arrange-

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settlement. This may be an interest properly furthered by Rule 23, but once respondents obtained both access to court and full individual relief that interest disappeared.

[7] Perhaps the strongest of respondents' statements is:

"Of course, the interest of the [respondents] in assertion of the right to proceed on behalf of the class includes such matters as the prospect for spreading attorney's fees and expenses among more claimants and thus reducing the percentage that would otherwise be payable by them." Plaintiffs-Appellants' Brief in Opposition to Motion to Dismiss Appeal and Reply Brief, filed in *Roper* v. *Consurve, Inc.*, No. 76-3600 (CA5, Jan. 10, 1977).

[8] Respondents' "Demand for Judgment" asks the court to award the "[c]ost of this action as well as attorney fees in the amount of 25% as hereinabove alleged, or such other amount as may be deemed fit and proper by the Court." App. 16. The request for fees was clarified in Paragraph VI of the amended complaint, which reads as follows:

"Plaintiff alleges that the Clerk of this Court be designated custodian of the funds and judgment to be paid Plaintiff and other persons similarly situated, by Defendants and the Clerk deposit said funds in a suitable depository and, upon proper order of this Court, disburse said funds after deduction of necessary expenses and attorney fees to Plaintiff's attorneys herein of twenty-five per cent (25%) of the amount so paid, the same being reasonable by all standards, including that alleged and

ment other than this customary type contingent fee is identified in the record or the briefs. Yet, no one has explained how respondents' obligation to pay 25% of their recovery to counsel could be reduced if a class is certified and its members become similarly obligated to pay 25% of their recovery. Thus, the asserted interest in "spreading [of] attorney's fees and expenses" [9] relates to no present obligation. It is at most an expectation—of the respondents' and particularly of their counsel—that certain fees and expenses may become payable in the event a class is certified. That expectation is wholly irrelevant to the existence of a present controversy between petitioner and respondents.

The Court's reliance on unidentified fees and expenses cannot be reconciled with the repeated admonition that "unadorned speculation will not suffice to invoke the federal judicial power." *E. g., Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26, 44 (1976). Such speculation is particularly inappropriate in this case, since neither the Court nor the respondents have suggested that the *petitioner* is or ever will be liable for the fees or expenses relied upon. Indeed, the American Rule would bar an award of attorney's fees against this petitioner. Thus, respondents' "injury"—if any exists—is not one that "fairly can be traced" to the petitioner. *Id.*, at 41–42; see *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[10] Whatever may be the basis for the

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utilized by Defendants in suing certain members in of [*sic*] the class in State Courts for unpaid accounts." *Id.*, at 13–14.

[9] See n. 7, *supra*.

[10] Far-reaching consequences could flow from a rule that fees recoverable from putative class members may be "traced" to the class defendant for purposes of the case-or-controversy requirement. At the least, this rule would support a claim that a person who has accepted full settlement of his individual claim is entitled to file suit on behalf of an unrecompensed class. Apparently, the putative plaintiff need only "asser[t]," *ante*, at 334, n. 6, that fees incurred in anticipation of the litigation ultimately might be shared with a prevailing class.

respondents' asserted desire to share fees and expenses with unnamed members of a class, the petitioner is merely a bystander. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971). This elementary principle should dispose of the case.

C

Since respondents have no continuing personal stake in the outcome of this action, Art. III and the precedents of this Court require that the case be dismissed as moot. *E. g.*, *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Preiser* v. *Newkirk*, 422 U. S., at 401–404; *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975); *DeFunis* v. *Odegaard*, 416 U. S. 312, 316–320 (1974) (*per curiam*); *North Carolina* v. *Rice*, *supra*, at 246; *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403, 407 (1972).[11]

Respondents do not suggest that their claims are "capable of repetition, yet evading review." Cf. *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975).[12] And not a single one of the alleged 90,000 class members has sought to intervene in the nine years since this action was filed. Cf. *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977). Nor has anyone challenged the allegedly usurious charges by informal com-

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[11] These cases are discussed more fully in *United States Parole Comm'n* v. *Geraghty*, *post*, at 410–413, 417–419 (POWELL, J., dissenting).

[12] If a class-action defendant were shown to have embarked on a course of conduct designed to insulate the class certification issue from appellate review in order to avoid classwide liability, a court in proper circumstances might find the *Gerstein* test satisfied and the case not moot. See *Susman* v. *Lincoln American Corp.*, 587 F. 2d 866 (CA7 1978); 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533, p. 208 (Cum. Supp. 1980); Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 599–600.

plaint or protest. Tr. of Oral Arg. 4. Even after certification was denied, the action lay dormant during the seven months in which respondents sought to take an interlocutory appeal, without provoking a response from anyone who previously may have thought that the class action would protect his rights. Apart from the persistence of the lawyers, this has been a noncase since the petitioner tendered full satisfaction of the respondents' individual claims. To be sure, respondents' counsel may have the same interest in an enlarged recovery that is inherent in any contingent fee arrangement. But I know of no decision by any court that holds that a lawyer's interest in a larger fee, to be paid by third persons not present in court, creates the personal stake in the outcome required by Art. III.

## II

Despite the absence of an Art. III controversy, the Court directs a remand in which this federal action will be litigated by lawyers whose only "clients" are unidentified class members who have shown no desire to be represented by anyone.[13] The Court appears to endorse this form of litigation for reasons of policy and practice. It is said to be an effective "response to the existence of injuries unremedied by the regulatory action of government." *Ante*, at 339. I am not aware that such a consideration ever before has influenced this Court in determining whether the *Constitution* confers jurisdiction on the federal courts. In any event, the consequences of a finding of mootness are not likely to be as restrictive as the Court seems to fear. And the Court fails to recognize that allowing this action to proceed without an interested plaintiff will itself generate practical difficulties of some magnitude.

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[13] I do not suggest that counsel acted improperly in pursuing this case. Since they have prevailed both in this Court and in the Court of Appeals, the responsibility for allowing clientless litigation falls on the federal courts.

A

A finding of mootness would have repercussions primarily in two situations. The first involves a named plaintiff who fails to obtain class certification and then pursues his case to a successful, litigated judgment. I believe that a subsequent attempt by that plaintiff to appeal the denial of certification generally would be barred by Art. III. But the consequences of applying settled rules of mootness in that situation would not be unjust. If injunctive or declaratory relief were granted, the absent members of the putative class would have obtained by force of *stare decisis* or the decree itself most of the benefits of actual class membership. If, on the other hand, damages were awarded and an appeal permitted, reversal of the certification ruling would enable putative class members to take advantage of a favorable judgment on the issue of liability without assuming the risk of being bound by an unfavorable judgment. Thus, the Court's decision to allow appeals in this situation will reinstate the "one-way intervention" that the 1966 amendments to Rule 23 were intended to eliminate.[14]

Perhaps more commonly, the mootness question will arise when the defendant attempts to force a settlement before judgment, as petitioner did in this case. A defendant certainly will have a substantial incentive to use this tactic in some cases. The Court argues that the result will be to deny compensation to putative class members and jeopardize the enforcement of certain legal rights by "'private attorney[s] general.'" *Ante*, at 338. The practical argument is not without force. But predicating a judgment on these concerns

[14] See Comment, Immediate Appealability of Orders Denying Class Certification, 40 Ohio St. L. J. 441, 470–471 (1979). In actions brought under Rule 23 (b)(3), a class member must decide at the time of certification whether to "opt out" of the action under Rule 23 (c)(2). This provision was designed to bring an end to the "spurious" class action in which class members were permitted to intervene after a decision on the merits in order to secure the benefits of that decision. Notes of the Advisory Committee on 1966 Amendments to Rule 23, 28 U. S. C. App., p. 430.

amounts to judicial policymaking with respect to the adequacy of compensation and enforcement available for particular substantive claims. Such a judgment ordinarily is best left to Congress. At the very least, the result should be consistent with the substantive law giving rise to the claim. Today, however, the Court never pauses to consider the law of usury. Since Mississippi law condemns the aggregation of usury claims,[15] the Court's concern for compensation of putative class members in this case is at best misplaced and at worst inconsistent with the command of the Rules Enabling Act.[16]

The Court's concern for putative class members would be more telling in a more appropriate case. A pattern of forced settlement could indeed waste judicial resources on the litigation of successive suits by members of the putative class. I do not doubt that the consequent problems of judicial administration would be real. But these problems can and should be addressed by measures short of undercutting the law of mootness, as the Court seems to have done today. The first step should be the authorization of interlocutory appeals from the denial of class certification in appropriate circumstances.[17]

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[15] *Liddell* v. *Litton Systems, Inc.*, 300 So. 2d 455 (1974) (rejecting borrower's class action); *Fry* v. *Layton*, 191 Miss. 17, 2 So. 2d 561 (1941). Petitioner is a national bank, and its alleged failure to comply with Mississippi's interest limits would violate the National Bank Act. 12 U. S. C. § 85. But I do not understand that the National Bank Act displaces state policy disfavoring the aggregation of usury claims. A primary purpose of that Act is to protect national banks from discriminatory treatment or undue penalties that may be imposed by state law. See 12 U. S. C. § 86.

[16] The Act provides that rules of procedure promulgated by this Court "shall not . . . enlarge or modify any substantive right." 28 U. S. C. § 2072. See *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 557–558 (1974); Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1358–1359 (1976). See generally Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. Cal. L. Rev. 842 (1974).

[17] In *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), this Court held that the denial of class certification is not a "final decision" appeal-

District courts already are empowered by 28 U. S. C. § 1292 (b) to certify such appeals when they involve certain controlling questions of law. In many cases, a class-action defendant undoubtedly would forgo the opportunity to settle with an individual plaintiff in order to obtain an immediate and final determination of the class certification question on appeal.

Where a defendant does attempt to moot a class action by forced settlement, the district court is not powerless. In at least some circumstances, it may require that putative class members receive some sort of notice and an opportunity to intervene within the appeal period. Rule 23 (d)(2). The availability of such measures could be a significant deterrent to the deliberate mooting of class actions. Indeed, district court management of the problem by measures tailored to the case at hand may well be preferable to the Court's open-ended approval of appeals in all circumstances. To the extent interlocutory appeals are unavailable or managerial powers are lacking, it is for Congress—not this Court—to correct the deficiency.[18]

B

Since a court is limited to the decision of the case before it, judicially fashioned "solutions" to legislative problems often

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able as of right under 28 U. S. C. § 1291. We relied in that case on the dangers of "indiscriminate" interlocutory review. 437 U. S., at 474. Although *Coopers & Lybrand* now prevents review in cases in which it would be desirable, Congress may remedy the problem by appropriate legislation.

[18] Congress currently has before it a bill that attempts to remedy the difficulties infecting this troubled area. H. R. 5103, 96th Cong., 1st Sess. (1979). The bill, supported by the Department of Justice, proposes to bypass the Rules Enabling Act problem, see n. 16, *supra*, and to eliminate some of the problems of claims too small to justify individual lawsuits, by creating a new federal right of action for damages. The bill provides for the enforcement of this right in some instances through actions brought in the name of the United States. The bill also authorizes interlocutory appeals from the grant or denial of the ruling that will replace class certification under the proposed procedures.

are attended by unfortunate practical consequences of their own. Today's holding is no exception. On remand, respondents will serve as "quasi-class representatives" solely for the purpose of obtaining class certification. Since they can gain nothing more from the action, their participation can be intended only to benefit counsel and the members of a putative class who have indicated no interest in the claims asserted in this case. Respondents serve on their own motion—if indeed they serve at all.[19] Since no court has certified the class, there has been no considered determination that respondents will fairly and adequately represent its members. Nothing in Rule 23 authorizes this novel procedure, and the requirements of the Rule are not easily adapted to it. Are respondents members of the class they seek to represent? See *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 403–404 (1977). Are their currently nonexistent claims "typical of the claims . . . of the class" within the meaning of Rule 23 (a)(3)?[20]

The Court's holding well may prevent future "forced settlements" of class-action litigation. Thus, the difficulties faced by the District Court on remand in this case may not arise again in precisely analogous circumstances. But today's result also authorizes appeals by putative class representatives who have litigated and prevailed on the merits of their individual claims. If the order denying class certification is reversed in that situation, the named plaintiffs on remand will have no more continuing relationship to the putative class than respondents have here. A remand for certification could also lead to "one-way intervention" in direct violation of Rule 23. See *supra*, at 354, and n. 14. These tensions,

[19] As noted *supra*, at 346, respondents took no appeal in their own names. One would think that this candid disclaimer of personal interest would destroy the foundation upon which the Court predicates Art. III jurisdiction. *Ante*, at 336; see *supra*, at 349.

[20] The District Court properly may conclude on remand that respondents, for these or other reasons, cannot adequately represent the class.

arising from the express terms of the Rule, undermine the Court's conclusion that the policies underlying Rule 23 dictate the result reached today.

## III

In sum, the Court's attempted solution to the problem of forced settlements in consumer class actions departs from settled principles of Art. III jurisprudence.[21] It unneces-

[21] MR. JUSTICE STEVENS states in his concurring opinion that all persons alleged to be members of a putative class "should be considered parties to the case or controversy at least for the limited purpose" of Art. III, and that they "remain parties until a final determination has been made that the action may not be maintained as a class action." *Ante*, at 342. This novel view apparently derives from early cases in which the Court referred to class members who would be bound by a judgment as "absent parties," *Hansberry* v. *Lee*, 311 U. S. 32, 42 (1940), or "parties in interest," *Smith* v. *Swormstedt*, 16 How. 288, 303 (1854). *Ante*, at 343, n. 3. But these cases were decided before certification was established as the method by which a class achieves judicial recognition. Under Rule 23, the members of a putative class will not be bound by a judgment unless a proper certification order is entered. That they may be "interested parties" before that time does not make them parties to the litigation in any sense, as this Court has recognized. In *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975), the Court held that an oral certification order was insufficient to identify the interests of absent class members for Art. III purposes. The result hardly could be different when the class has not been identified at all. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978); *Baxter* v. *Palmigiano*, 425 U. S. 308, 310–311, n. 1 (1976); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975); *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 430 (1976).

MR. JUSTICE STEVENS indicates that unnamed members of an uncertified class may be "present" as parties for some purposes and not for others. No authority is cited for such selective "presence" in an action. Nor is any explanation offered as to how a court is to determine when these unidentified "parties" are present. If their presence is to be limited to the satisfaction of the Art. III case-or-controversy requirement, then the rule of party status would have no content apart from Art. III and could only be described as a legal fiction. If, on the other hand, the proposed rule is to apply outside the Art. III context, it may have troublesome and far-reaching implications that could prejudice the bringing of

sarily creates significant problems in the administration of Rule 23. And it may work a serious injustice in this case.[22] I would vacate the judgment of the Court of Appeals and remand with instructions to dismiss the appeal as moot.

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class actions. Presumably, a purpose of the rule of party status would be to assure that satisfaction of the claims of named parties would not terminate the litigation. Nor could the rights of unnamed parties be extinguished by the failure of the named parties to appeal. Thus, if the rule proposed by MR. JUSTICE STEVENS is to accomplish its purpose, I suppose that a fiduciary duty must be imposed upon named parties to continue the litigation where—as here—the unnamed parties remain unidentified and fail to intervene. As fiduciaries, would the named parties be required not only to continue to litigate, but also to assume personal responsibility for costs and attorney's fees if the case ultimately is lost? Would responsible litigants be willing to file class actions if they thereby assumed such long-term fiduciary obligations? These and like questions are substantial. They are not resolved by Rule 23. I believe they merit careful study by Congress before this Court—perhaps unwittingly—creates a major category of clientless litigation unique in our system.

[22] The Court's resurrection of this dead controversy may result in irreparable injury to innocent parties, as well as to the petitioner bank. When the District Court denied certification on September 29, 1975, it assigned as one of its reasons the possible "destruction of the [petitioner] bank" by damages then alleged to total $12 million and now potentially augmented by the accrual of interest. App. 47; see *ante*, at 329, n. 2. The possible destruction of the bank is irrelevant to the jurisdictional issue, but serious indeed to depositors, stockholders, and the community served. It is said that this is necessary to redress injuries possibly suffered by members of the putative class. Yet, no such person has come forward in the nearly nine years that have passed since this action was filed. Indeed, the challenged conduct was authorized by statute almost six years ago. As the District Court may be called upon to determine whether the equitable doctrine of "relation back" permits it to toll the statute of limitations on remand, *ante*, at 330, n. 3, it will hardly be inappropriate for that court to consider the equities on both sides. In the circumstances presented, the District Court may well see no reason to exercise its equitable discretion in favor of putative class members who have slept on their rights these many years.

# UNITED STATES v. GILLOCK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78–1455. Argued December 4, 1979—Decided March 19, 1980

A federal indictment charged respondent, then a Tennessee state senator, with accepting money as fees for using his public office to block the extradition of a defendant from Tennessee to Illinois, and for agreeing to introduce state legislation which would enable four persons to obtain master electricians' licenses they had been unable to obtain by way of existing examination processes. The District Court granted respondent's motion to suppress all evidence relating to his legislative activities, holding that as a state senator respondent was entitled to a judicially created evidentiary privilege. The District Court relied on Rule 501 of the Federal Rules of Evidence, which provides in relevant part that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The Court of Appeals affirmed the District Court's recognition of a privilege and its suppression of certain items of evidence; it held that other items of evidence were insufficiently related to the legislative process to be protected by the privilege.

*Held:* In a federal criminal prosecution against a state legislator there is no legislative privilege barring the introduction of evidence of the legislative acts of the legislator. Pp. 366–374.

(a) Rule 501's language and legislative history do not support respondent's arguments that a speech-or-debate type privilege for state legislators in federal criminal cases is an established part of the federal common law and is therefore applicable through the Rule, or that such a privilege is compelled by principles of federalism. Rule 501 requires the application of federal privilege law in criminal cases brought in federal court, and thus the fact that there is an evidentiary privilege under the Tennessee Constitution which respondent could assert in a state criminal prosecution does not compel an analogous privilege in a federal prosecution. Pp. 366–368.

(b) The historical antecedents and policy considerations which inspired the Speech or Debate Clause of the Federal Constitution do not require recognition of a comparable evidentiary privilege for state legislators in federal prosecutions. The first rationale underlying the Speech or Debate Clause, resting solely on the separation-of-powers

doctrine, gives no support to the grant of a privilege to state legislators in federal prosecutions. As to the second rationale underlying the Speech or Debate Clause, that is, the need to insure legislative independence, this Court's decisions on immunity of state officials from suit have drawn the line at civil actions. Cf., *e. g.*, *Tenney* v. *Brandhove*, 341 U. S. 367; *O'Shea* v. *Littleton*, 414 U. S. 488. Where important federal interests are at stake, as in the enforcement of federal criminal statutes, principles of comity must yield. Recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefits to the state legislative process. Pp. 368–373.

(c) Congress has not chosen either to provide that a state legislator prosecuted under federal law should be accorded the same evidentiary privileges as a Member of Congress, or to direct federal courts to apply to a state legislator the same evidentiary privileges available in a prosecution of a similar charge in the state courts. In the absence of a constitutional limitation on Congress' power to make state officials, like all other persons, subject to federal criminal sanctions, there is no basis in these circumstances for a judicially created limitation that excludes proof of the relevant facts. P. 374.

587 F. 2d 284, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting statement, in which POWELL, J., joined, *post*, p. 374.

*Solicitor General McCree* argued the cause for the United States. With him on the briefs were *Assistant Attorney General Heymann, Deputy Solicitor General Frey, Jerome M. Feit,* and *Louis M. Fischer.*

*James V. Doramus* argued the cause for respondent. With him on the brief were *James F. Neal, James F. Sanders,* and *Hal Gerber.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict in the Circuits over whether the federal courts in a federal criminal prosecu-

tion should recognize a legislative privilege barring the introduction of evidence of the legislative acts of a state legislator charged with taking bribes or otherwise obtaining money unlawfully through exploitation of his official position.[1] 441 U. S. 942 (1979).

## I

Respondent Edgar H. Gillock was indicted on August 12, 1976, in the Western District of Tennessee on five counts of obtaining money under color of official right in violation of 18 U. S. C. § 1951, one count of using an interstate facility to distribute a bribe in violation of 18 U. S. C. § 1952,[2] and one count of participating in an enterprise through a pattern of racketeering activity in violation of 18 U. S. C. § 1962. The indictment charged Gillock, then a Tennessee state senator and practicing attorney, with accepting money as a fee for using his public office to block the extradition of a defendant from Tennessee to Illinois, and for agreeing to introduce in the State General Assembly legislation which would enable four persons to obtain master electricians' licenses they had been unable to obtain by way of existing examination processes.

Before trial, Gillock moved to suppress all evidence relating to his legislative activities. The District Court granted his motion, holding that as a state senator, Gillock had an evidentiary privilege cognizable under Rule 501 of the Federal Rules of Evidence. This privilege, deemed by the District Court to be equivalent to that granted Members of both Houses of Congress under the Speech or Debate Clause, Art. I, § 6, cl. 1, was limited to prohibiting the introduction of evidence of Gillock's legislative acts and his underlying motivations.

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[1] Compare *United States* v. *DiCarlo*, 565 F. 2d 802 (CA1 1977), cert. denied, 435 U. S. 924 (1978), and *United States* v. *Craig*, 537 F. 2d 957 (CA7) (en banc), cert. denied, 429 U. S. 999 (1976), with *In re Grand Jury Proceedings*, 563 F. 2d 577 (CA3 1977).

[2] The count based on 18 U. S. C. § 1952 was subsequently dismissed by the District Court.

The court stated that the privilege is necessary "to protect the integrity of the [state's] legislative process by insuring the independence of individual legislators" and "to preserve the constitutional relation between our federal and state governments in our federal system."

The Government appealed the pretrial suppression order to the United States Court of Appeals for the Sixth Circuit, see 18 U. S. C. § 3731, which vacated the order and remanded for additional consideration. 559 F. 2d 1222 (1977). The Court of Appeals noted that although the District Court had expressed its willingness to recognize a legislative privilege, it had not applied the principle to particularize items of evidence.

On remand, the Government submitted a formal offer of proof and requested a ruling on the applicability of the legislative privilege to 15 specifically described items of evidence.[3] The offer first detailed the evidence the Government proposed to introduce at trial in support of the count of the indictment charging Gillock with soliciting money from one Ruth Howard in exchange for using his influence as a state senator to block the extradition of Howard's brother, James Michael Williams. Williams had been arrested in Tennessee in November 1974, and was being held as a fugitive from Illinois. According to the offer of proof, in January 1975 Howard met in Memphis with her brother's attorney, John Hundley, who allegedly told her that he had a "friend" who could help her brother. A meeting between Gillock and Howard was arranged by Hundley, and Gillock agreed to exercise his influence to block the extradition for a fee.

The Government declared its intention to prove that on March 6, 1975, Gillock appeared at Williams' extradition

[3] The Government stated that the offer was made on the assumption that the District Court's prior ruling was correct. The Government, however, explicitly reserved its position that state legislators in federal criminal prosecutions are not entitled to an evidentiary privilege comparable to the Speech or Debate Clause.

hearing. Although he denied that he was attending the hearing either as an attorney or in his capacity as a state senator, Gillock reviewed the extradition papers and questioned the hearing officer about the propriety of extradition on a misdemeanor charge. Later that day, Gillock requested an official opinion from the Tennessee Attorney General concerning "Extradition on a Misdemeanor." [4]

In addition, the Government stated it intended to introduce at trial the transcript of a telephone call Gillock made to Howard on March 25, 1975. During that conversation, Gillock allegedly advised Howard that he had delayed the extradition proceedings, and could have blocked them entirely, by exerting pressure on the extradition hearing officer who had appeared before Gillock's senate judiciary committee on a budgetary matter. To corroborate that conversation, the Government indicated it would prove that on March 19, 1975, Gillock attended a meeting of the senate judiciary committee where the same extradition hearing officer who conducted Williams' extradition hearing presented his department's budget request.

Next, the Government recited the evidence it proposed to introduce showing that Gillock used his influence as a member of the Tennessee State Senate to assist four individuals in obtaining master electricians' licenses valid in Shelby County, Tenn. According to the offer of proof, the four contacted Gillock in early 1972. Two weeks later, Gillock advised them that he could get legislation enacted by the General Assembly which would provide for reciprocity in licensing. Under his proposal, a person who received a license in another county could be admitted without a test in Shelby County. The prosecution represented it would offer evidence that Gillock

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[4] Gillock would be entitled to request an opinion from the State Attorney General by virtue of his status as a state senator. Only state government officials, not private attorneys, can secure official opinions. Tenn. Code Ann. § 8-609 (b)(6) (Supp. 1979).

fixed a contingent fee of $5,000 per person, to be refunded if the legislation was not passed.

The Government also represented that it would offer evidence that Gillock introduced reciprocity legislation in the senate and that he arranged for the introduction of a similar bill in the house. The Government further proposed to introduce statements made by Gillock on the floor of the senate in support of the bill. After the bill was passed by both branches of the legislature and forwarded to the Governor, several private persons, including union representatives, allegedly met with Gillock and voiced their opposition to the legislation. The Government intended to prove that Gillock replied that he could not financially afford to withdraw the legislation because he had already accepted "fees" for introducing it. Finally, the Government intended to prove that on April 13, 1972, Gillock moved to override the Governor's veto of the legislation, and stated that it would introduce into evidence any and all statements made by Gillock on the floor of the senate in support of his motion to override.

Based on this offer of proof, the District Court granted Gillock's renewed motion to exclude evidence of his legislative acts under Rule 501. It ruled inadmissible Gillock's official request for an opinion from the Attorney General regarding extradition and the answer to that request, and Gillock's statements to Howard that he could exert pressure on the extradition hearing officer to block the extradition because the hearing officer had appeared before Gillock's legislative committee. Similarly, the court ruled that all evidence regarding Gillock's introduction and support of the electricians' reciprocal licensing bill, his conversation with the private individuals who opposed the legislation, and the Governor's veto letter would be inadmissible.

The Government again appealed the District Court's suppression order. The Court of Appeals by a divided vote held that "the long history and the felt need for protection of

legislative speech or debate and the repeated and strong recognition of that history in the cases . . . from the Supreme Court, fully justify our affirming [the District Court] in [its] protection of the privilege in this case." 587 F. 2d 284, 290 (1978). Turning to the scope of the privilege, the court affirmed the suppression of evidence of Gillock's request for a formal opinion from the Attorney General, his participation in the senate judiciary committee, his introduction of the reciprocity legislation, his motion on the floor of the senate to override the Governor's veto, and all the statements he made on the floor of the senate. The other items of evidence were considered to be insufficiently related to the legislative process to be protected by the privilege.

## II

Gillock urges that we construct an evidentiary privilege barring the introduction of evidence of legislative acts in federal criminal prosecutions against state legislators. He argues first that a speech or debate type privilege for state legislators in federal criminal cases is an established part of the federal common law and is therefore applicable through Rule 501.[5] Second, he contends that even apart from Rule 501, a legislative speech or debate privilege is compelled by principles of federalism rooted in our constitutional structure.

It is clear that were we to recognize an evidentiary privilege similar in scope to the Federal Speech or Debate Clause, much of the evidence at issue here would be inadmissible. Recently, in *United States* v. *Helstoski*, 442 U. S. 477, 489 (1979), we reaffirmed our holding in *United States* v. *Brewster*, 408 U. S. 501, 525 (1972), that with respect to Members of Congress "[t]he Clause protects 'against inquiry into acts that occur

[5] Gillock makes no claim that state legislators are entitled to the benefits of the Federal Speech or Debate Clause, which by its terms applies only to "Senators and Representatives." See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 404 (1979).

in the regular course of the legislative process and into the motivation for those acts.' " Under that standard, evidence of Gillock's participation in the state senate committee hearings and his votes and speeches on the floor would be privileged and hence inadmissible.

The language and legislative history of Rule 501 give no aid to Gillock. The Rule provides in relevant part that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[6] Congress substituted the present language of Rule 501 for the draft proposed by the Advisory Committee of the Judicial Conference of the United States to provide the courts with greater flexibility in developing rules of privilege on a case-by-case basis. Under the Judicial Conference proposed rules submitted to Congress, federal courts would have been permitted to apply only nine specifically enumerated privileges, except as otherwise required by the Constitution or provided by Acts of Congress. See Proposed Federal Rules of Evidence 501–513, H. R. Doc. No. 93–46, pp. 9–19 (1973). Neither the Advisory Committee, the Judicial Conference, nor this Court saw fit, however, to provide the privilege sought by Gillock. Although that fact standing alone would not compel the federal courts to refuse to recognize a privilege omitted from the proposal, it does suggest that

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[6] Rule 501 provides in full:

"Except as otherwise required by the Constitution of the United States as provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism.[7]

Moreover, the House Conference Committee Report on the Federal Rules of Evidence leaves little doubt that Rule 501 requires the application of federal privilege law in criminal cases brought in federal court.[8] H. R. Conf. Rep. No. 93–1597, p. 7 (1974). Cf. *Wolfle* v. *United States*, 291 U. S. 7, 13 (1934) (the admissibility of evidence in criminal trials in the federal courts "is to be controlled by common law principles, not by local statute"); *Funk* v. *United States*, 290 U. S. 371 (1933). Thus, the fact that there is an evidentiary privilege under the Tennessee Constitution, Art. II, § 13, which Gillock could assert in a criminal prosecution in state court does not compel an analogous privilege in a federal prosecution.

## III

Gillock argues that the historical antecedents and policy considerations which inspired the Speech or Debate Clause of the Federal Constitution should lead this Court to recognize a comparable evidentiary privilege for state legislators in federal prosecutions. The important history of the Speech or Debate Clause has been related abundantly in opinions of this Court and need not be repeated. See, *e. g.*, *United States* v. *Helstoski*, *supra*; *United States* v. *Brewster*, *supra*; *United States* v. *Johnson*, 383 U. S. 169 (1966). Suffice it to recall that England's experience with monarchs exerting pressure

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[7] We also find it significant that we have not been cited to a single instance in the legislative history of Rule 501 where any Member of Congress manifested interest in providing an evidentiary privilege for state legislators charged in federal court with a violation of a federal criminal statute.

[8] This is not to suggest that the privilege law as developed in the states is irrelevant. This Court has taken note of state privilege laws in determining whether to retain them in the federal system. See, *e. g.*, *Trammel* v. *United States*, *ante*, p. 40 (rejection of the antimarital facts privilege).

on members of Parliament by using judicial process to make them more responsive to their wishes led the authors of our Constitution to write an explicit legislative privilege into our organic law. In statutes subject to repeal or in judge-made rules of evidence readily changed by Congress or the judges who made them, the protection would be far less than the legislative privilege created by the Federal Constitution.

Our cases, however, have made clear that "[a]lthough the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system." *United States* v. *Brewster*, 408 U. S., at 508. In deciding whether the principles underlying the federal constitutional speech or debate privilege compel a similar evidentiary privilege on behalf of state legislators, the analysis must look primarily to the American experience, including our structure of federalism which had no counterpart in England.

Two interrelated rationales underlie the Speech or Debate Clause: first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence. *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491, 502–503 (1975). Cases considering the Speech or Debate Clause have frequently arisen in the context of a federal criminal prosecution of a Member of Congress and have therefore accented the first rationale. Only recently in such a case, we re-emphasized that a central purpose of the Clause is "to preserve the constitutional structure of separate, coequal, and independent branches of government. The English and American history of the privilege suggests that any lesser standard would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities." *United States* v. *Helstoski*, 442 U. S., at 491. Accord, *United States* v. *Johnson*, *supra*, at 180–181. The Framers viewed the speech or debate privilege as fundamental to the system of checks and balances. 8 The

Works of Thomas Jefferson 322 (Ford ed. 1904); 1 The Works of James Wilson 421 (R. McCloskey ed. 1967).

The first rationale, resting solely on the separation of powers doctrine, gives no support to the grant of a privilege to state legislators in federal criminal prosecutions. It requires no citation of authorities for the proposition that the Federal Government has limited powers with respect to the states, unlike the unfettered authority which English monarchs exercised over the Parliament. By the same token, however, in those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power. Thus, under our federal structure, we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators.

Apart from the separation of powers doctrine, it is also suggested that principles of comity require the extension of a speech or debate type privilege to state legislators in federal criminal prosecutions. However, as we have noted, federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch. *Baker* v. *Carr*, 369 U. S. 186, 210 (1962). Cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 489–492 (1965) (federal court may enjoin state-court application of a clearly unconstitutional statute).[9] Our opinion in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), is not to the contrary. There, we held that a federal statute regulating the wages of state

[9] Compare *Powell* v. *McCormack*, 395 U. S. 486 (1969) (suit for injunction against individual Members of Congress to require the seating of Representative Adam Clayton Powell barred by the Speech or Debate Clause), with *Bond* v. *Floyd*, 385 U. S. 116 (1966) (individual state legislators enjoined from depriving Julian Bond of his seat in the Georgia Legislature).

employees was unconstitutional because it "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.*, at 852.

The absence of a judicially created evidentiary privilege for state legislators is not, however, comparable intervention by the Federal Government into essential state functions. First, Gillock's argument, resting on the Tenth Amendment, has no special force with regard to state legislators; on the rationale advanced, state executive officers and members of the state judiciary would have equally plausible claims that the denial of an evidentiary privilege to them resulted in a direct federal impact on traditional state governmental functions. Moreover, we recognized in *National League of Cities* that the regulation by Congress under the Commerce Clause of individuals is quite different from legislation which directly regulates the internal functions of states. *Id.*, at 840–841. Although the lack of an evidentiary privilege for a state legislator might conceivably influence his conduct while in the legislature, it is not in any sense analogous to the direct regulation imposed by the federal wage-fixing legislation in *National League of Cities.*

The second rationale underlying the Speech or Debate Clause is the need to insure legislative independence. Gillock relies heavily on *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), where this Court was cognizant of the potential for disruption of the state legislative process. The issue there, however, was whether state legislators were immune from civil suits for alleged violations of civil rights under 42 U. S. C. § 1983. The claim was made by a private individual who alleged that a state legislative committee hearing was conducted to prevent him from exercising his First Amendment rights. The Court surveyed the history of the speech or debate privilege from its roots in the British parliamentary experience through its adoption in our own Federal Constitu-

tion. In light of these "presuppositions of our political history," 341 U. S., at 372, the Court stated:

> "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of § 1983] before us." *Id.*, at 376.

Accordingly, the Court held that a state legislator's common-law absolute immunity from civil suit survived the passage of the Civil Rights Act of 1871.[10]

Although *Tenney* reflects this Court's sensitivity to interference with the functioning of state legislators, we do not read that opinion as broadly as Gillock would have us. First, *Tenney* was a civil action brought by a private plaintiff to vindicate private rights. Moreover, the cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials. As recently as *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), we stated:

> "Whatever may be the case with respect to civil liability generally, . . . or civil liability for willful corruption, . . . we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. . . . *On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress. . . .' Gravel* v. *United States*, 408 U. S. 606, 627 (1972)." *Id.*, at 503 (emphasis supplied).

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[10] Despite the frequent invocation of the federal Speech or Debate Clause in *Tenney*, the Court has made clear that the holding was grounded on its interpretation of federal common law, not on the Speech or Debate Clause. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S., at 404.

Accord, *Imbler* v. *Pachtman*, 424 U. S. 409, 429 (1976); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974). Thus, in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions.[11]

We conclude, therefore, that although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields. We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in *United States* v. *Nixon*, 418 U. S. 683 (1974), when balanced against the need of enforcing federal criminal statutes. There, the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding. See also *United States* v. *Burr*, 25 F. Cas. 187 (No. 14,694) (CC Va. 1807). Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.[12]

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[11] Federal prosecutions of state and local officials, including state legislators, using evidence of their official acts are not infrequent. See, *e. g.*, *United States* v. *Rabbitt*, 583 F. 2d 1014 (CA8 1978), cert. denied, 439 U. S. 1116 (1979); *United States* v. *Mazzei*, 521 F. 2d 639 (CA3), cert. denied, 423 U. S. 1014 (1975); *United States* v. *Homer*, 411 F. Supp. 972 (WD Pa. 1976). See also *Anderson* v. *United States*, 417 U. S. 211, 214–215 (1974). Of course, even a Member of Congress would not be immune under the federal Speech or Debate Clause from prosecution for the acts which form the basis of the Hobbs Act, 18 U. S. C. § 1951, and RICO, 18 U. S. C. § 1962, charges here. See *United States* v. *Helstoski*, 442 U. S. 477 (1979).

[12] Cf. *Gravel* v. *United States*, 408 U. S. 606, 627 (1972) ("[W]e cannot

## IV

The Federal Speech or Debate Clause, of course, is a limitation on the Federal Executive, but by its terms is confined to federal legislators. The Tennessee Speech or Debate Clause is in terms a limit only on the prosecutorial powers of that State. Congress might have provided that a state legislator prosecuted under federal law should be accorded the same evidentiary privileges as a Member of Congress. Alternatively, Congress could have imported the "spirit" of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), into federal criminal law and directed federal courts to apply to a state legislator the same evidentiary privileges available in a prosecution of a similar charge in the courts of the state. But Congress has chosen neither of these courses.

In the absence of a constitutional limitation on the power of Congress to make state officials, like all other persons, subject to federal criminal sanctions, we discern no basis in these circumstances for a judicially created limitation that handicaps proof of the relevant facts. Accordingly, the judgment of the Court of Appeals for the Sixth Circuit is

*Reversed.*

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

For the reasons stated by Chief Judge Edwards in his opinion in this case for the Court of Appeals for the Sixth Circuit, I would affirm the judgment of that court.

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carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute").

Syllabus

# GTE SYLVANIA, INC., ET AL. *v.* CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1248. Argued November 28, 1979—Decided March 19, 1980

In connection with an investigation of hazards in the operation of television receivers, respondent Consumer Product Safety Commission (CPSC) obtained various accident reports from television manufacturers, including petitioners. Respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group (requesters) sought disclosure of the accident reports under the Freedom of Information Act (FOIA), and the CPSC determined that the reports did not fall within any of the FOIA's exemptions and notified the requesters and the manufacturers that it would release the material on a specified date. Petitioners then filed suits in various Federal District Courts to enjoin disclosure of the allegedly confidential reports, which suits were consolidated in the Federal District Court for the District of Delaware. While those suits were pending, the requesters filed the instant action against the CPSC, its Chairman, Commissioners, and Secretary, and petitioners in the Federal District Court for the District of Columbia, seeking release of the accident reports under the FOIA. That court dismissed the complaint while a motion for a preliminary injunction was still pending in Delaware, observing that the CPSC had assured the court that disclosure would be made as soon as the agency was not enjoined from doing so, and concluding, *inter alia*, that there was no Art. III case or controversy between the requesters and the federal defendants and therefore no jurisdiction. Ultimately, the Court of Appeals reversed, holding that there was a case or controversy between the requesters and the CPSC as to the scope and effect of the proceedings in Delaware, and that a permanent injunction which meanwhile had been issued in the Delaware proceedings did not foreclose the requesters' FOIA suit.

*Held:*

1. There is a case or controversy as required to establish jurisdiction pursuant to Art. III even though the CPSC agrees with the requesters that the documents should be released under the FOIA. While there is no case or controversy when the parties desire "precisely the same result," here the parties do not desire "precisely the same result," since

the CPSC contends that the Delaware injunction prevents it from releasing the documents, whereas the requesters believe that an equitable decree obtained by the manufacturers in a suit in which the requesters were not parties cannot deprive them of their rights under the FOIA. Pp. 382–383.

2. Information may not be obtained under the FOIA when the agency holding the material has been enjoined from disclosing it by a federal district court. The Act gives federal district courts jurisdiction to order the production of "improperly" withheld agency records, but here the CPSC has not "improperly" withheld the accident reports. The Act's legislative history shows that Congress was largely concerned with the unjustified suppression of information by agency officials in the exercise of their discretion, but here the CPSC had no discretion to exercise since its sole basis for not releasing the documents was the injunction issued by the Federal District Court in Delaware. The CPSC was required to obey the injunction out of respect for judicial process, and there is nothing in the legislative history to suggest that Congress intended to require an agency to commit contempt of court in order to release documents. Pp. 384–387.

192 U. S. App. D. C. 93, 590 F. 2d 1209, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

*Harry L. Shniderman* argued the cause for petitioners. With him on the briefs were *Bernard G. Segal, James D. Crawford, Deena Jo Schneider, Robert W. Steele, Alan M. Grimaldi, Stephen B. Clarkson, William F. Patten, D. Clifford Crook III, Burton Y. Weitzenfeld, Michael A. Stiegel, Nancy L. Buc, Peter Gartland,* and *J. Wallace Adair.*

*Deputy Solicitor General Geller* argued the cause for the federal respondents. With him on the brief were *Solicitor General McCree* and *Richard A. Allen.*

*Alan B. Morrison* argued the cause for respondents Consumers Union of the United States, Inc., et al. With him on the brief was *Diane B. Cohn.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the issue whether information may be obtained under the Freedom of Information Act, 5 U. S. C.

§ 552, when the agency holding the material has been enjoined from disclosing it by a federal district court.

## I

In March 1974, respondent Consumer Product Safety Commission (CPSC) announced that it would hold a public hearing to investigate hazards in the operation of television receivers and to consider the need for safety standards for televisions. 39 Fed. Reg. 10929. In the notice the CPSC requested from television manufacturers certain information on television-related accidents. After reviewing the material voluntarily submitted, the CPSC through orders, 15 U. S. C. § 2076 (b)(1), and subpoenas, 15 U. S. C. § 2076 (b)(3), obtained from the manufacturers, including petitioners, various accident reports. Claims of confidentiality accompanied most of the reports.

Respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group (the requesters) sought disclosure of the accident reports from the CPSC under the Freedom of Information Act. The requesters were given access only to those documents for which no claim of confidentiality had been made by the manufacturers. As for the rest, the CPSC gave the manufacturers an opportunity to substantiate their claims of confidentiality. The requesters agreed to wait until mid-March 1975 for the CPSC's determination of the availability of those allegedly confidential documents.

In March 1975, the CPSC informed the requesters and the manufacturers that the documents sought did not fall within any of the exemptions of the Freedom of Information Act, and that even if disclosure was not mandated by that Act, the CPSC would exercise its discretion to release the material on May 1, 1975. Upon receiving the notice, petitioners filed suit in the United States District Court for the District of Dela-

ware and three other Federal District Courts,[1] seeking to enjoin disclosure of the allegedly confidential reports. Petitioners contended that release of the information was prohibited by § 6 of the Consumer Product Safety Act, 15 U. S. C. § 2055, by exemptions to the Freedom of Information Act,[2] and by the Trade Secrets Act, 18 U. S. C. § 1905. Petitioners sought temporary restraining orders in all of the actions, and the CPSC consented to such orders in at least some of the cases. Subsequently the manufacturers' individual actions were consolidated in the District of Delaware, and that court issued a series of temporary restraining orders. Finally, in October 1975 the Delaware District Court entered a preliminary injunction prohibiting release of the documents pending trial. *GTE Sylvania Inc.* v. *Consumer Product Safety Comm'n*, 404 F. Supp. 352 (1975).

The requesters did not seek to intervene in the Delaware action, nor did petitioners or the CPSC attempt to have the requesters joined. Instead, on May 5, 1975, the requesters filed the instant action in Federal District Court for the District of Columbia, seeking release of the accident reports under the Freedom of Information Act. Named as defendants in that suit were the CPSC, its Chairman, Commissioners,

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[1] GTE Sylvania, Inc., RCA Corp., Magnavox Co., Zenith Radio Corp., Motorola, Inc., Warwick Electronics, Inc., and Aeronutronic Ford Corp. filed individual actions in the District of Delaware. Matsushita Electric Corp. of America, Sharp Electronic Corp., and Toshiba-America, Inc., filed actions in the Southern District of New York. General Electric Co. filed suit in the Northern District of New York. Admiral Corp. filed suit in the Western District of Pennsylvania. A 13th manufacturer, Teledyne Mid-America Corp., also brought suit, but that action was voluntarily dismissed. See *GTE Sylvania Inc.* v. *Consumer Product Safety Comm'n*, 438 F. Supp. 208, 210, n. 1 (Del. 1977).

[2] The theory of the so-called "reverse Freedom of Information Act" suit, that the exemptions to the Act were mandatory bars to disclosure and that therefore submitters of information could sue an agency under the Act in order to enjoin release of material, was squarely rejected in *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 290–294 (1979).

and Secretary, and all of the petitioners. In September 1975, while the motion for a preliminary injunction was still pending in Delaware, the District Court for the District of Columbia dismissed the requesters' complaint. The court observed that the CPSC had determined that the reports should be disclosed and had assured the court on the public record that disclosure would be made as soon as the agency was not enjoined from doing so. The court concluded that there was no Art. III case or controversy between the plaintiffs and the federal defendants and therefore no jurisdiction. It also held that the complaint failed to state a claim against petitioners upon which relief could be granted since they no longer possessed the records sought by the requesters. Nor could petitioners be subject to suit under the compulsory joinder provision of Federal Rule of Civil Procedure 19 (a) since that Rule is predicated on the pre-existence of federal jurisdiction over the cause of action, which was not present here. *Consumers Union of United States, Inc.* v. *Consumer Product Safety Comm'n*, 400 F. Supp. 848 (DC 1975).

The United States Court of Appeals for the District of Columbia Circuit reversed. *Consumers Union of United States, Inc.* v. *Consumer Product Safety Comm'n*, 182 U. S. App. D. C. 351, 561 F. 2d 349 (1977). That court concluded that there was a case or controversy between the plaintiffs and the CPSC on "the threshold question of the scope and effect of the proceedings in Delaware." *Id.*, at 356, 561 F. 2d, at 354. In addition, the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [the requesters'] argument that the requested documents should be disclosed." *Id.*, at 357, 561 F. 2d, at 355.[3] The Court of Appeals held that the preliminary in-

[3] The Court of Appeals noted that the CPSC took nine months from the date of the initial request for the documents to announce its determination that the material should be disclosed. In addition, the CPSC failed to make even *pro forma* opposition to the motions for temporary restraining orders and did not object to the manufacturers' requests for extensions of

junction issued by the Delaware court did not foreclose the requesters' suit under the Freedom of Information Act. That injunction did not resolve the merits of the claim, but instead was merely *pendente lite* relief. Thus, the order could not bar the Freedom of Information Act suit in the District of Columbia, although it would weigh in the decision as to which of the two suits should be stayed pending the outcome of the other. The court concluded, however, that such balancing was not required because the Delaware court had entered an order "closing out" that case without further action.[4] The Delaware action was effectively dismissed and therefore the preliminary injunction was "dead" and did not bar the Freedom of Information Act suit.[5] In addition, the CPSC's efforts in the Delaware action, which the court below considered "less than vigilant," and the resulting absence of full representation of the prodisclosure argument prevented the preliminary injunction from having preclusive effect.[6]

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those orders. Finally, the CPSC moved to dismiss its own interlocutory appeal to the United States Court of Appeals for the Third Circuit, which motion was granted. 182 U. S. App. D. C., at 357, n. 27, 561 F. 2d, at 355, n. 27.

[4] The minute order entered by the Delaware District Court provided that "since the parties do not now know whether further action [after the grant of the preliminary injunction] is contemplated in this litigation, there is no need to maintain these cases as open litigation for statistical purposes." Accordingly, the Clerk of that court was ordered to "close these cases for statistical purposes." The entry specifically stated that "[n]othing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered." App. to Pet. for Cert. A108.

[5] On petition for rehearing the Court of Appeals was informed that the Delaware case had only been marked "closed" for statistical purposes and that in fact the Delaware case had become active again soon after the Court of Appeals' initial ruling. The court nevertheless concluded that "there appears no reason why the litigation should not proceed here," 184 U. S. App. D. C. 146, 147, 565 F. 2d 721, 722 (1977) (*per curiam*).

[6] The CPSC then moved the Federal District Court in Delaware to

The manufacturers filed a petition for writ of certiorari. While that petition was pending, the Delaware District Court granted the manufacturers' motion for summary judgment and permanently enjoined the CPSC from disclosing the accident data. *GTE Sylvania, Inc.* v. *Consumer Product Safety Comm'n,* 443 F. Supp. 1152 (1977). We granted certiorari, vacated the judgment of the Court of Appeals for the District of Columbia Circuit, and remanded the case "for further consideration in light of the permanent injunction" entered in Delaware. *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.,* 434 U. S. 1030 (1978).

On remand, the Court of Appeals reaffirmed its holding that there was a case or controversy within the meaning of Art. III.[7] *Consumers Union of United States, Inc.* v. *Consumer Product Safety Comm'n,* 192 U. S. App. D. C. 93, 100, 590 F. 2d 1209, 1216 (1978). The court also held that the Delaware permanent injunction should not prevent the continuation of the District of Columbia action. *Stare decisis* would not require deference to the Delaware court's decision if it was in error. Collateral estoppel was inapplicable because the requesters were not parties to the Delaware action and an agency's interests diverge too widely from the private interests of Freedom of Information Act requesters for the agency to constitute an adequate representative. Finally, the prin-

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transfer that litigation to the District of Columbia pursuant to 28 U. S. C. § 1404. This motion was denied on the grounds that the Delaware action was much further advanced than the District of Columbia suit and a transfer at that late date would only delay a decision on the merits. *GTE Sylvania Inc.* v. *Consumer Product Safety Comm'n,* 438 F. Supp. 208 (Del. 1977).

[7] The CPSC had initially taken the position before the Court of Appeals that there was no Art. III case or controversy. However, when the case was first before this Court the CPSC announced that it was now persuaded there was a case or controversy, and it has continued to hold that view throughout this litigation. See Brief for Federal Respondents 21, n. 10; *Consumers Union of United States, Inc.* v. *Consumer Product Safety Comm'n,* 192 U. S. App. D. C. 93, 100, n. 33, 590 F. 2d 1209, 1216, n. 33 (1978).

ciple of comity did not mandate a different result since the requesters were not before the Delaware court. The court below concluded that "none of the familiar anti-relitigation doctrines operates to deprive nonparty requesters of their right to sue for enforcement of the Freedom of Information Act; rather, they remain unaffected by prior litigation solely between the submitters and the involved agency." *Id.*, at 103, 590 F. 2d, at 1219. The case was remanded to the District Court for a decision on the merits. If that court concluded that the Freedom of Information Act required disclosure of the reports, it could consider enjoining petitioners from enforcing their final judgment awarded by the Delaware court.

We granted certiorari, 441 U. S. 942 (1979), because of the importance of the issue presented.[8] We now reverse.

## II

The threshold question raised by petitioners is whether there is a case or controversy as required to establish jurisdiction pursuant to Art. III. Petitioners urge here, as the District Court held below, that since the CPSC agrees with the requesters that the documents should be released under the Freedom of Information Act, there is no actual controversy presented in this suit. We do not agree.

The purpose of the case-or-controversy requirement is to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). The clash of adverse parties "'sharpens the presentation of issues upon which the court

[8] The United States Court of Appeals for the Third Circuit has affirmed the grant of the permanent injunction by the Federal District Court in Delaware, *GTE Sylvania, Inc.* v. *Consumer Product Safety Comm'n*, 598 F. 2d 790 (1979), and we have granted certiorari to review that judgment. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 444 U. S. 979 (1979).

so largely depends for illumination of difficult . . . questions.' " *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974), quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). See also *Flast* v. *Cohen*, *supra*, at 96–97. Accordingly, there is no Art. III case or controversy when the parties desire "precisely the same result," *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 47, 48 (1971) (*per curiam*). See also *Muskrat* v. *United States*, 219 U. S. 346, 361 (1911).

The CPSC and the requesters do not want "precisely the same result" in this litigation. It is true that the federal defendants have expressed the view that the reports in question should be released and in fact notified the District Court that absent the Delaware injunction the information would be disclosed. See 400 F. Supp., at 853, n. 14. That injunction has been issued, however, and the basic question in this case is the effect of that order on the requesters. The CPSC contends that the injunction prevents it from releasing the documents, while the requesters believe that an equitable decree obtained by the manufacturers in a suit in which those seeking disclosure were not parties cannot deprive them of their rights under the Freedom of Information Act. In short, the issue in this case is whether, given the existence of the Delaware injunction, the CPSC has violated the Freedom of Information Act at all. The federal defendants and the requesters sharply disagree on this question, as has been evidenced at every stage of this litigation. If the requesters prevail on the merits of their claim, the CPSC will be subject to directly contradictory court orders, a prospect which the federal defendants naturally wish to avoid. It cannot be said, therefore, that the parties desire "precisely the same result." The requirements of Art. III have been satisfied.[9]

[9] We need not reach the requesters' argument that the clear conflict between them and the petitioners would produce the necessary case or controversy even if there was no such controversy between the requesters and the federal defendants. We also need not discuss the suggestion of the Court of Appeals that the CPSC does not in fact agree with the re-

## III

The issue squarely presented is whether the Court of Appeals erred in holding that the requesters may obtain the accident reports under the Freedom of Information Act when the agency with possession of the documents has been enjoined from disclosing them by a Federal District Court. The terms of the Act and its legislative history demonstrate that the court below was in error.

The Freedom of Information Act gives federal district courts the jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U. S. C. § 552 (a)(4)(B). This section requires a showing of three components: the agency must have (1) improperly (2) withheld (3) agency records. *Kissinger* v. *Reporters Committee for Freedom of the Press, ante,* at 150. In this case the sole question is whether the first requirement, that the information has been "improperly" withheld, has been satisfied.

The statute provides no definition of the term "improperly." The legislative history of the Act, however, makes clear what Congress intended. The Freedom of Information Act was a revision of § 3, the "public information" section, of the Administrative Procedure Act, 5 U. S. C. § 1002 (1964 ed.). The prior law had failed to provide the desired access to information relied upon in Government decisionmaking, and in fact had become "the major statutory excuse for withholding Government records from public view." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 3 (1966) (hereinafter H. R. Rep. No. 1497). See also *id.*, at 4, 12; S. Rep. No. 813, 89th Cong., 1st Sess., 3, 5 (1965) (hereinafter S. Rep. No. 813); *EPA* v. *Mink*, 410 U. S. 73, 79 (1973). Section 3 had several vague phrases upon which officials could rely to refuse requests for disclosure: "in the public interest," "relating solely to the in-

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questers that the documents should be disclosed even absent the Delaware injunction. See n. 3, *supra.*

ternal management of an agency," "for good cause." Even material on the public record was available only to "persons properly and directly concerned." These undefined phrases placed broad discretion in the hands of agency officials in deciding what information to disclose, and that discretion was often abused. The problem was exacerbated by the lack of an adequate judicial remedy for the requesters. See generally H. R. Rep. No. 1497, at 4–6; S. Rep. No. 813, at 4–5; 112 Cong. Rec. 13642, reprinted in Freedom of Information Act Source Book, 93d Cong., 2d Sess., 47 (Comm. Print 1974) (remarks of Rep. Moss) (hereinafter Source Book); *id.*, at 52 (remarks of Rep. King); *id.*, at 71 (remarks of Rep. Rumsfeld); *EPA* v. *Mink*, *supra*, at 79.

The Freedom of Information Act was intended "to establish a general philosophy of full agency disclosure," S. Rep. No. 813, at 3, and to close the "loopholes which allow agencies to deny legitimate information to the public," *ibid.* The attention of Congress was primarily focused on the efforts of officials to prevent release of information in order to hide mistakes or irregularities committed by the agency. *Ibid.*; H. R. Rep. No. 1497, at 6; Source Book 69 (remarks of Rep. Monagan); *id.*, at 70 (remarks of Rep. Rumsfeld); *id.*, at 73–74 (remarks of Rep. Hall), and on needless denials of information. Examples considered by Congress included the refusal of the Secretary of the Navy to release telephone directories, the decision of the National Science Foundation not to disclose cost estimates submitted by unsuccessful contractors as bids for a multimillion-dollar contract, and the Postmaster General's refusal to release the names of postal employees. See H. R. Rep. No. 1497, at 5–6.

Thus Congress was largely concerned with the unjustified suppression of information by agency officials. S. Rep. No. 813, at 5. Federal employees were denying requests for documents without an adequate basis for nondisclosure, and Congress wanted to curb this apparently unbridled discretion. Source Book 46–47 (remarks of Rep. Moss); *id.*, at 61 (re-

marks of Rep. Fascell); *id.*, at 70 (remarks of Rep. Rumsfeld); *id.*, at 71 (remarks of Rep. Skubitz); *id.*, at 80 (remarks of Rep. Anderson). It is in this context that Congress gave the federal district courts under the Freedom of Information Act jurisdiction to order the production of "improperly" withheld agency records. It is enlightening that the Senate Report uses the terms "improperly" and "wrongfully" interchangeably. S. Rep. No. 813, at 3, 5, 8.

The present case involves a distinctly different context. The CPSC has not released the documents sought here solely because of the orders issued by the Federal District Court in Delaware. At all times since the filing of the complaint in the instant action the agency has been subject to a temporary restraining order or a preliminary or permanent injunction barring disclosure. There simply has been no discretion for the agency to exercise. The concerns underlying the Freedom of Information Act are inapplicable, for the agency has made no effort to avoid disclosure; indeed, it is not the CPSC's decision to withhold the documents at all.

The conclusion that the information in this case is not being "improperly" withheld is further supported by the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order. See *Howat* v. *Kansas*, 258 U. S. 181, 189–190 (1922); *United States* v. *Mine Workers*, 330 U. S. 258 (1947); *Walker* v. *City of Birmingham*, 388 U. S. 307, 314–321 (1967); *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 439 (1976). There is no doubt that the Federal District Court in Delaware had jurisdiction to issue the temporary restraining orders and preliminary and permanent injunctions. Nor were those equitable decrees challenged as "only a frivolous pretense to validity," *Walker* v. *City of Birmingham, supra*, at 315, although of course there is disagreement over whether the District Court erred in

issuing the permanent injunction.[10] Under these circumstances, the CPSC was required to obey the injunctions out of "respect for judicial process," 388 U. S., at 321.

There is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents. Indeed, Congress viewed the federal courts as the necessary protectors of the public's right to know. To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as "improperly" withholding documents under the Freedom of Information Act would do violence to the common understanding of the term "improperly" and would extend the Act well beyond the intent of Congress.

We conclude that the CPSC has not "improperly" withheld the accident reports from the requesters under the Freedom of Information Act.[11] The judgment of the United States Court of Appeals for the District of Columbia Circuit accordingly is

*Reversed.*

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[10] We intimate no view on that issue, which is raised in *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, No. 79–521, cert. granted, 444 U. S. 979 (1979).

[11] We need not address the issue whether the principle of comity mandated that the District of Columbia court stay or dismiss the action because the Delaware court had jurisdiction over the manufacturers' suit prior to the filing of the requesters' complaint.

# UNITED STATES PAROLE COMMISSION ET AL. *v.* GERAGHTY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-572. Argued October 2, 1979—Decided March 19, 1980

Respondent, after twice being denied parole from a federal prison, brought suit against petitioners in Federal District Court challenging the validity of the United States Parole Commission's Parole Release Guidelines. The District Court denied respondent's request for certification of the suit as a class action on behalf of a class of "all federal prisoners who are or who will become eligible for release on parole," and granted summary judgment for petitioners on the merits. Respondent was released from prison while his appeal to the Court of Appeals was pending, but that court held that this did not render the case moot, and went on to hold, with respect to the question whether the District Court had erroneously denied class certification, that class certification would not be inappropriate, since the problems of overbroad classes and of a potential conflict of interest between respondent and other members of the putative class could be remedied by the mechanism of subclasses. Accordingly, the Court of Appeals reversed the denial of class certification and remanded the case to the District Court for an initial evaluation *sua sponte* of the proper subclasses.

*Held:* An action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied, since the proposed representative of the class retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal from denial of the class certification results in reversal of the denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna* v. *Iowa*, 419 U. S. 393, that mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot. Pp. 395-408.

(a) The fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits, cf. *Gerstein* v. *Pugh*, 420 U. S. 103; *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. 326, does not mean that all other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues, one

being the claim on the merits and the other being the claim that he is entitled to represent a class. "The denial of class certification stands as an adjudication of one of the issues litigated," *Roper, ante,* at 336, and in determining whether the plaintiff may continue to press the class certification claim after the claim on the merits "expires," the nature of the "personal stake" in the class certification claim must be examined. P. 402.

(b) The imperatives of a dispute capable of judicial resolution—sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions—can exist with respect to the class certification issue notwithstanding that the named plaintiff's claim on the merits has expired. Such imperatives are present in this case where the question whether class certification is appropriate remains as a concrete, sharply presented issue, and respondent continues vigorously to advocate his right to have a class certified. Pp. 403–404.

(c) Respondent was a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined, and hence it was not improper for the Court of Appeals to consider whether the District Court should have granted class certification. P. 407.

(d) The Court of Appeals' remand of the case for consideration of subclasses was a proper disposition, except that the burden of constructing subclasses is not upon the District Court but upon the respondent. Pp. 407–408.

579 F. 2d 238, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post,* p. 409.

*Kent L. Jones* argued the cause *pro hac vice* for petitioners. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Easterbrook, Jerome M. Feit,* and *Elliott Schulder.*

*Kenneth N. Flaxman* argued the cause for respondent. With him on the brief was *Thomas R. Meites.**

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**Robert J. Hobbs* filed a brief for the National Client Council, Inc., et al. as *amici curiae* urging affirmance.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot." The United States Court of Appeals for the Third Circuit held that a named plaintiff, respondent here, who brought a class action challenging the validity of the United States Parole Commission's Parole Release Guidelines, could continue his appeal of a ruling denying class certification even though he had been released from prison while the appeal was pending. We granted certiorari, 440 U. S. 945 (1979), to consider this issue of substantial significance, under Art. III of the Constitution, to class-action litigation,[1] and to resolve the conflict in approach among the Courts of Appeals.[2]

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[1] The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *United States* v. *Addonizio*, 442 U. S. 178, 184 (1979). We have concluded, however, that it would be premature to reach the merits of that question at this time. See *infra*, at 408.

While the petition for a writ of certiorari was pending, respondent Geraghty filed a motion to substitute as respondents in this Court five prisoners, then incarcerated, who also were represented by Geraghty's attorneys. In the alternative, the prisoners sought to intervene. We deferred our ruling on the motion to the hearing of the case on the merits. 440 U. S. 945 (1979). These prisoners, or most of them, now also have been released from incarceration. On September 25, 1979, a supplement to the motion to substitute or intervene was filed, proposing six new substitute respondents or intervenors; each of these is a presently incarcerated federal prisoner who, allegedly, has been adversely affected by the guidelines and who is represented by Geraghty's counsel.

Since we hold that respondent may continue to litigate the class certification issue, there is no need for us to consider whether the motion should be granted in order to prevent the case from being moot. We conclude that the District Court initially should rule on the motion.

[2] See, *e. g.*, *Armour* v. *City of Anniston*, 597 F. 2d 46, 48–49 (CA5 1979); *Susman* v. *Lincoln American Corp.*, 587 F. 2d 866 (CA7 1978), cert. pending, No. 78–1169; *Goodman* v. *Schlesinger*, 584 F. 2d 1325, 1332–1333 (CA4 1978); *Camper* v. *Calumet Petrochemicals, Inc.*, 584

## I

In 1973, the United States Parole Board adopted explicit Parole Release Guidelines for adult prisoners.[3] These guidelines establish a "customary range" of confinement for various classes of offenders. The guidelines utilize a matrix, which combines a "parole prognosis" score (based on the prisoner's age at first conviction, employment background, and other personal factors) and an "offense severity" rating, to yield the "customary" time to be served in prison.

Subsequently, in 1976, Congress enacted the Parole Commission and Reorganization Act (PCRA), Pub. L. 94–233, 90 Stat. 219, 18 U. S. C. §§ 4201–4218. This Act provided the first legislative authorization for parole release guidelines. It required the newly created Parole Commission to "promulgate rules and regulations establishing guidelines for the powe[r] . . . to grant or deny an application or recommendation to parole any eligible prisoner." § 4203. Before releasing a prisoner on parole, the Commission must find, "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner," that release "would not depreciate the seriousness of his offense or promote disrespect for the law" and that it "would not jeopardize the public welfare." § 4206 (a).

Respondent John M. Geraghty was convicted in the United States District Court for the Northern District of Illinois of

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F. 2d 70 (CA5 1978); *Roper* v. *Consurve, Inc.*, 578 F. 2d 1106 (CA5 1978), aff'd *sub nom. Deposit Guaranty Nat. Bank* v. *Roper, ante*, p. 326; *Satterwhite* v. *City of Greenville*, 578 F. 2d 987 (CA5 1978) (en banc), cert. pending, No. 78–1008; *Vun Cannon* v. *Breed*, 565 F. 2d 1096 (CA9 1977); *Winokur* v. *Bell Federal Savings & Loan Assn.*, 560 F. 2d 271 (CA7 1977), cert. denied, 435 U. S. 932 (1978); *Lasky* v. *Quinlan*, 558 F. 2d 1133 (CA2 1977); *Kuahulu* v. *Employers Ins. of Wausau*, 557 F. 2d 1334 (CA9 1977); *Boyd* v. *Justices of Special Term*, 546 F. 2d 526 (CA2 1976); *Napier* v. *Gertrude*, 542 F. 2d 825 (CA10 1976), cert. denied, 429 U. S. 1049 (1977).

[3] 38 Fed. Reg. 31942–31945 (1973). The guidelines currently in force appear at 28 CFR § 2.20 (1979).

conspiracy to commit extortion, in violation of 18 U. S. C. § 1951, and of making false material declarations to a grand jury, in violation of 18 U. S. C. § 1623 (1976 ed. and Supp. II).[4] On January 25, 1974, two months after initial promulgation of the release guidelines, respondent was sentenced to concurrent prison terms of four years on the conspiracy count and one year on the false declarations count. The United States Court of Appeals for the Seventh Circuit affirmed respondent's convictions. *United States* v. *Braasch*, 505 F. 2d 139 (1974), cert. denied *sub nom. Geraghty* v. *United States*, 421 U. S. 910 (1975).

Geraghty later, pursuant to a motion under Federal Rule of Criminal Procedure 35, obtained from the District Court a reduction of his sentence to 30 months. The court granted the motion because, in the court's view, application of the guidelines would frustrate the sentencing judge's intent with respect to the length of time Geraghty would serve in prison. *United States* v. *Braasch*, No. 72 CR 979 (ND Ill., Oct. 9, 1975), appeal dism'd and mandamus denied, 542 F. 2d 442 (CA7 1976).

Geraghty then applied for release on parole. His first application was denied in January 1976 with the following explanation:

> "Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody for a total of 4 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26–36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found

[4] The extortion count was based on respondent's use of his position as a vice squad officer of the Chicago police force to "shake down" dispensers of alcoholic beverages; the false declarations concerned his involvement in this scheme.

> that a decision at this consideration outside the guidelines does not appear warranted." App. 5.

If the customary release date applicable to respondent under the guidelines were adhered to, he would not be paroled before serving his entire sentence minus good-time credits. Geraghty applied for parole again in June 1976; that application was denied for the same reasons. He then instituted this civil suit as a class action in the United States District Court for the District of Columbia, challenging the guidelines as inconsistent with the PCRA and the Constitution, and questioning the procedures by which the guidelines were applied to his case.

Respondent sought certification of a class of "all federal prisoners who are or who will become eligible for release on parole." *Id.*, at 17. Without ruling on Geraghty's motion, the court transferred the case to the Middle District of Pennsylvania, where respondent was incarcerated. Geraghty continued to press his motion for class certification, but the court postponed ruling on the motion until it was prepared to render a decision on cross-motions for summary judgment.

The District Court subsequently denied Geraghty's request for class certification and granted summary judgment for petitioners on all the claims Geraghty asserted. 429 F. Supp. 737 (1977). The court regarded respondent's action as a petition for a writ of habeas corpus, to which Federal Rule of Civil Procedure 23 applied only by analogy. It denied class certification as "neither necessary nor appropriate." 429 F. Supp., at 740. A class action was "necessary" only to avoid mootness. The court found such a consideration not comprehended by Rule 23. It found class certification inappropriate because Geraghty raised certain individual issues and, inasmuch as some prisoners might be benefited by the guidelines, because his claims were not typical of the entire proposed class. 429 F. Supp., at 740–741. On the merits, the court ruled that the guidelines are consistent with the PCRA and

do not offend the *Ex Post Facto* Clause, U. S. Const., Art. I, § 9, cl. 3. 429 F. Supp., at 741–744.

Respondent, individually "and on behalf of a class," appealed to the United States Court of Appeals for the Third Circuit. App. 29. Thereafter, another prisoner, Becher, who had been denied parole through application of the guidelines and who was represented by Geraghty's counsel, moved to intervene. Becher sought intervention to ensure that the legal issue raised by Geraghty on behalf of the class "will not escape review in the appeal in this case." Pet. to Intervene After Judgment 2. The District Court, concluding that the filing of Geraghty's notice of appeal had divested it of jurisdiction, denied the petition to intervene. Becher then filed a timely notice of appeal from the denial of intervention. The two appeals were consolidated.

On June 30, 1977, before any brief had been filed in the Court of Appeals, Geraghty was mandatorily released from prison; he had served 22 months of his sentence, and had earned good-time credits for the rest. Petitioners then moved to dismiss the appeals as moot. The appellate court reserved decision of the motion to dismiss until consideration of the merits.

The Court of Appeals, concluding that the litigation was not moot, reversed the judgment of the District Court and remanded the case for further proceedings. 579 F. 2d 238 (CA3 1978). If a class had been certified by the District Court, mootness of respondent Geraghty's personal claim would not have rendered the controversy moot. See, *e. g.*, *Sosna* v. *Iowa*, 419 U. S. 393 (1975). The Court of Appeals reasoned that an erroneous *denial* of a class certification should not lead to the opposite result. 579 F. 2d, at 248–252. Rather, certification of a "certifiable" class, that erroneously had been denied, relates back to the original denial and thus preserves jurisdiction. *Ibid.*

On the question whether certification erroneously had been denied, the Court of Appeals held that necessity is not a pre-

requisite under Rule 23. 579 F. 2d, at 252. The court expressed doubts about the District Court's finding that class certification was "inappropriate." While Geraghty raised some claims not applicable to the entire class of prisoners who are or will become eligible for parole, the District Court could have "certif[ied] certain issues as subject to class adjudication, and . . . limite[d] overbroad classes by the use of sub-classes." *Id.*, at 253. Failure "to consider these options constituted a failure properly to exercise discretion." *Ibid.* "Indeed, this authority may be exercised *sua sponte*." *Ibid.* The Court of Appeals also held that refusal to certify because of a potential conflict of interest between Geraghty and other members of the putative class was error. The subclass mechanism would have remedied this problem as well. *Id.*, at 252–253. Thus, the Court of Appeals reversed the denial of class certification and remanded the case to the District Court for an initial evaluation of the proper subclasses. *Id.*, at 254. The court also remanded the motion for intervention. *Id.*, at 245, n. 21.[5]

In order to avoid "improvidently dissipat[ing] judicial effort," *id.*, at 254, the Court of Appeals went on to consider whether the trial court had decided the merits of respondent's case properly. The District Court's entry of summary judgment was found to be error because "if Geraghty's recapitulation of the function and genesis of the guidelines is supported by the evidence," the guidelines "may well be" unauthorized or unconstitutional. *Id.*, at 259, 268. Thus, the dispute on the merits also was remanded for further factual development.

## II

Article III of the Constitution limits federal "judicial Power," that is, federal-court jurisdiction, to "Cases" and "Controversies." This case-or-controversy limitation serves

[5] Apparently Becher, too, has now been released from prison.

"two complementary" purposes. *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). It limits the business of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Ibid.* Likewise, mootness has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969).

It is clear that the controversy over the validity of the Parole Release Guidelines is still a "live" one between petitioners and at least some members of the class respondent seeks to represent. This is demonstrated by the fact that prisoners currently affected by the guidelines have moved to be substituted, or to intervene, as "named" respondents in this Court. See n. 1, *supra*. We therefore are concerned here with the second aspect of mootness, that is, the parties' interest in the litigation. The Court has referred to this concept as the "personal stake" requirement. *E. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755 (1976); *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

The personal-stake requirement relates to the first purpose of the case-or-controversy doctrine—limiting judicial power to disputes capable of judicial resolution. The Court in *Flast* v. *Cohen*, 392 U. S., at 100–101, stated:

> "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. . . . Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adver-

> sary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' *Baker* v. *Carr*, [369 U. S.], at 204, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests,' *Aetna Life Insurance Co.* v. *Haworth*, [300 U. S.], at 240–241."

See also *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 216–218 (1974).

The "personal stake" aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973).

## III

On several occasions the Court has considered the application of the "personal stake" requirement in the class-action context. In *Sosna* v. *Iowa*, 419 U. S. 393 (1975), it held that mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot. It reasoned that "even though appellees . . . might not again enforce the Iowa durational residency requirement against [the class representative], it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified." *Id.*, at 400. The Court stated specifically that an Art. III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even

though the claim of the named plaintiff has become moot." *Id.*, at 402.[6]

Although one might argue that *Sosna* contains at least an implication that the critical factor for Art. III purposes is the timing of class certification, other cases, applying a "relation back" approach, clearly demonstrate that timing is not crucial. When the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation. *E. g., Gerstein* v. *Pugh*, 420 U. S. 103, 110, n. 11 (1975). The "capable of repetition, yet evading review" doctrine, to be sure, was developed outside the class-action context. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 514–515 (1911). But it has been applied where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake. See, *e. g., Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975); *Roe* v. *Wade*, 410 U. S. 113, 123–125 (1973). Since the litigant faces some likelihood of becoming involved in the same controversy in the future, vigorous advocacy can be expected to continue.

When, however, there is no chance that the named plaintiff's expired claim will reoccur, mootness still can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim. *E. g., Franks* v. *Bowman Transportation Co.*, 424 U. S., at 752–757. See *Kremens* v. *Bart-*

[6] The claim in *Sosna* also fit the traditional category of actions that are deemed not moot despite the litigant's loss of personal stake, that is, those "capable of repetition, yet evading review." See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). In *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 753–755 (1976), however, the Court held that the class-action aspect of mootness doctrine does not depend on the class claim's being so inherently transitory that it meets the "capable of repetition, yet evading review" standard.

*ley*, 431 U. S. 119, 129–130 (1977). Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires. The Court considered this possibility in *Gerstein* v. *Pugh*, 420 U. S., at 110, n. 11. *Gerstein* was an action challenging pretrial detention conditions. The Court assumed that the named plaintiffs were no longer in custody awaiting trial at the time the trial court certified a class of pretrial detainees. There was no indication that the particular named plaintiffs might again be subject to pretrial detention. Nonetheless, the case was held not to be moot because:

> "The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." *Ibid.*

See also *Sosna* v. *Iowa*, 419 U. S., at 402, n. 11.

In two different contexts the Court has stated that the proposed class representative who proceeds to a judgment on the merits may appeal *denial* of class certification. First, this assumption was "an important ingredient," *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, at 338, in the rejection of interlocutory appeals, "as of right," of class certification denials. *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978). The Court reasoned that denial of class status will not necessarily be the "death knell" of a small-claimant action, since there still remains "the prospect of prevailing on

the merits and reversing an order denying class certification." *Ibid.*

Second, in *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393–395 (1977), the Court held that a putative class member may intervene, for the purpose of appealing the denial of a class certification motion, after the named plaintiffs' claims have been satisfied and judgment entered in their favor. Underlying that decision was the view that "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs." *Id.*, at 393. See also *Coopers & Lybrand* v. *Livesay*, 437 U. S., at 469. And today, the Court holds that named plaintiffs whose claims are satisfied through entry of judgment over their objections may appeal the denial of a class certification ruling. *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. 326.

*Gerstein*, *McDonald*, and *Roper* are all examples of cases found not to be moot, despite the loss of a "personal stake" in the merits of the litigation by the proposed class representative. The interest of the named plaintiffs in *Gerstein* was precisely the same as that of Geraghty here. Similarly, after judgment had been entered in their favor, the named plaintiffs in *McDonald* had no continuing narrow personal stake in the outcome of the class claims. And in *Roper* the Court points out that an individual controversy is rendered moot, in the strict Art. III sense, by payment and satisfaction of a final judgment. *Ante*, at 333.

These cases demonstrate the flexible character of the Art. III mootness doctrine.[7] As has been noted in the past,

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[7] Three of the Court's cases might be described as adopting a less flexible approach. In *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975), and in *Weinstein* v. *Bradford*, 423 U. S. 147 (1975), dismissal of putative class suits, as moot, was ordered after the named plaintiffs' claims became moot. And in *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 430 (1976), it was indicated that the action would have been moot, upon expiration of the named plaintiffs' claims, had not the United States intervened as a party plaintiff. Each of these, however,

Art. III justiciability is "not a legal concept with a fixed content or susceptible of scientific verification." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion). "[T]he justiciability doctrine [is] one of uncertain and shifting contours." *Flast* v. *Cohen*, 392 U. S., at 97.

## IV

Perhaps somewhat anticipating today's decision in *Roper*, petitioners argue that the situation presented is entirely different when mootness of the individual claim is caused by "expiration" of the claim, rather than by a judgment on the claim. They assert that a proposed class representative who individually prevails on the merits still has a "personal stake" in the outcome of the litigation, while the named plaintiff whose claim is truly moot does not. In the latter situation, where no class has been certified, there is no party before the court with a live claim, and it follows, it is said, that we have no jurisdiction to consider whether a class should have been certified. Brief for Petitioners 37–39.

We do not find this distinction persuasive. As has been noted earlier, Geraghty's "personal stake" in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*. Further, the opinion in *Roper* indicates that the approach to take in applying Art. III is issue by issue. "Nor does a confession of judg-

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was a case in which there was an attempt to appeal the merits without first having obtained proper certification of a class. In each case it was the defendant who petitioned this Court for review. As is observed subsequently in the text, appeal from denial of class classification is permitted in some circumstances where appeal on the merits is not. In the situation where the proposed class representative has lost a "personal stake," the merits cannot be reached until a class properly is certified. Although the Court perhaps could have remanded *Jacobs* and *Weinstein* for reconsideration of the class certification issue, as the Court of Appeals did here, the parties in those cases did not suggest "relation back" of class certification. Thus we do not find this line of cases dispositive of the question now before us.

ment by defendants on less than all the issues moot an entire case; other issues in the case may be appealable. We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification." *Ante,* at 333. See also *United Airlines, Inc.* v. *McDonald,* 432 U. S., at 392; *Powell* v. *McCormack,* 395 U. S., at 497.

Similarly, the fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class. "The denial of class certification stands as an adjudication of one of the issues litigated," *Roper, ante,* at 336. We think that in determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits "expires," we must look to the nature of the "personal stake" in the class certification claim. Determining Art. III's "uncertain and shifting contours," see *Flast* v. *Cohen,* 392 U. S., at 97, with respect to nontraditional forms of litigation, such as the class action, requires reference to the purposes of the case-or-controversy requirement.

Application of the personal-stake requirement to a procedural claim, such as the right to represent a class, is not automatic or readily resolved. A "legally cognizable interest," as the Court described it in *Powell* v. *McCormack,* 395 U. S., at 496, in the traditional sense rarely ever exists with respect to the class certification claim.[8] The justifications that led to the development of the class action include the protection of

[8] Were the class an indispensable party, the named plaintiff's interests in certification would approach a "legally cognizable interest."

the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims. See, *e. g.*, Advisory Committee Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., pp. 427–429; Note, Developments in the Law, Class Actions, 89 Harv. L. Rev. 1318, 1321–1323, 1329–1330 (1976). Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so,[9] these benefits generally are by-products of the class-action device. In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met. This "right" is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the "personal stake" requirement. See *Roper, ante,* at 338.

As noted above, the purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 753–756; *Baker* v. *Carr*, 369 U. S., at 204; *Poe* v. *Ullman*, 367 U. S., at 503 (plurality opinion). We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. The question whether class certification is appropriate remains as a concrete, sharply pre-

[9] See, *e. g.*, Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. Cal. L. Rev. 842 (1974); Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F. R. D. 375 (1972).

sented issue. In *Sosna* v. *Iowa* it was recognized that a named plaintiff whose claim on the merits expires *after* class certification may still adequately represent the class. Implicit in that decision was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome." Respondent here continues vigorously to advocate his right to have a class certified.

We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied.[10] The proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.

Our holding is limited to the appeal of the denial of the class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified. See *Roper*, *ante*, at 336–337. If, on appeal, it is determined that class certification properly was denied, the claim on the merits must be dismissed as moot.[11]

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[10] We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from the adverse ruling on class certification. See *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393–394, and n. 14 (1977).

[11] Mr. Justice Powell, in his dissent, advocates a rigidly formalistic approach to Art. III, *post*, at 412, and suggests that our decision today is the Court's first departure from the formalistic view. *Post*, at 414–419. We agree that the issue at hand is one of first impression and thus, in that narrow sense, is "unprecedented," *post*, at 419. We do not believe, however, that the decision constitutes a redefinition of Art. III principles or a "significant departur[e]," *post*, at 409, from "carefully considered" precedents, *post*, at 418.

The erosion of the strict, formalistic perception of Art. III was begun

**Our conclusion that the controversy here is not moot does not automatically establish that the named plaintiff is entitled to continue litigating the interests of the class. "[I]t does**

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well before today's decision. For example, the protestations of the dissent are strikingly reminiscent of Mr. Justice Harlan's dissent in *Flast* v. *Cohen*, 392 U. S. 83, 116, in 1968. Mr. Justice Harlan hailed the taxpayer-standing rule pronounced in that case as a "new doctrine" resting "on premises that do not withstand analysis." *Id.*, at 117. He felt that the problems presented by taxpayer standing "involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system." *Id.*, at 116. The taxpayers were thought to complain as "private attorneys-general," and "[t]he interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration." *Id.*, at 119. Such taxpayer actions "are and must be . . . 'public actions' brought to vindicate public rights." *Id.*, at 120.

Notwithstanding the taxpayers' lack of a formalistic "personal stake," even Mr. Justice Harlan felt that the case should be held nonjusticiable on purely prudential grounds. His interpretation of the cases led him to conclude that "it is . . . clear that [plaintiffs in a public action] as such are not *constitutionally* excluded from the federal courts." *Ibid.* (emphasis in original).

Is it not somewhat ironic that MR. JUSTICE POWELL, who now seeks to explain *United Airlines, Inc.* v. *McDonald*, *supra*, as a straightforward application of settled doctrine, *post*, at 416–417, expressed in his dissent in *McDonald*, 432 U. S., at 396, the view that the holding rested on a fundamental misconception about the mootness of an uncertified class action after settlement of the named plaintiffs' claims? He stated:

"Pervading the Court's opinion is the assumption that the class action somehow continued after the District Court denied class status. But that assumption is supported neither by the text nor by the history of Rule 23. To the contrary, . . . the denial of class status converts the litigation to an ordinary nonclass action." *Id.*, at 399.

The dissent went on to say:

"[Petitioner] argues with great force that, as a result of the settlement of their individual claims, the named plaintiffs 'could no longer appeal the denial of class' status that had occurred years earlier. . . . Although this question has not been decided by this Court, the answer on principle is clear. The settlement of an individual claim typically moots any issues associated with it. . . . This case is sharply distinguishable from cases such as *Sosna* v. *Iowa* . . . and *Franks* v. *Bowman Transp. Co.* . . . where

shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.' Rule 23 (a)."

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we allowed named plaintiffs whose individual claims were moot to continue to represent their classes. In those cases, the District Courts previously had certified the classes, thus giving them 'a legal status separate from the interest[s] asserted by [the named plaintiffs].' *Sosna* v. *Iowa*, *supra*, at 399. This case presents precisely the opposite situation: The prior denial of class status had extinguished any representative capacity." *Id.*, at 400 (footnote omitted).

Thus, the assumption thought to be "[p]ervading the Court's opinion" in *McDonald*, and so vigorously attacked by the dissent there, is now relegated to "gratuitous" "dictum," *post*, at 416. MR. JUSTICE POWELL, who finds the situation presented in the case at hand "fundamentally different" from that in *Sosna* and *Franks*, *post*, at 413, also found the facts of *McDonald* "sharply distinguishable" from those previous cases. 432 U. S., at 400.

We do not recite these cases for the purpose of showing that our result is mandated by the precedents. We concede that the prior cases may be said to be somewhat confusing, and that some, perhaps, are irreconcilable with others. Our point is that the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, the Court has looked to practicalities and prudential considerations. The resulting doctrine can be characterized, aptly, as "flexible"; it has been developed, not irresponsibly, but "with some care," *post*, at 410, including the present case.

The dissent is correct that once exceptions are made to the formalistic interpretation of Art. III, principled distinctions and bright lines become more difficult to draw. We do not attempt to predict how far down the road the Court eventually will go toward premising jurisdiction "upon the bare existence of a sharply presented issue in a concrete and vigorously argued case," *post*, at 421. Each case must be decided on its own facts. We hasten to note, however, that this case does not even approach the extreme feared by the dissent. This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal-stake requirement if damages were sought. See, *e. g.*, *Powell* v. *McCormack*, 395 U. S., at 495–500. His injury continued up to and beyond the time the District Court denied class certification. We merely hold that when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the

*Sosna* v. *Iowa*, 419 U. S., at 403. We hold only that a case or controversy still exists. The question of who is to represent the class is a separate issue.[12]

We need not decide here whether Geraghty is a proper representative for the purpose of representing the class on the merits. No class as yet has been certified. Upon remand, the District Court can determine whether Geraghty may continue to press the class claims or whether another representative would be appropriate. We decide only that Geraghty was a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined. Thus, it was not improper for the Court of Appeals to consider whether the District Court should have granted class certification.

## V

We turn now to the question whether the Court of Appeals' decision on the District Court's class certification ruling was proper. Petitioners assert that the Court of Appeals erred in requiring the District Court to consider the possibility of cer-

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action from becoming moot, an appeal lies from the denial and the corrected ruling "relates back" to the date of the original denial.

The judicial process will not become a vehicle for "concerned bystanders," *post*, at 413, even if one in respondent's position can conceivably be characterized as a bystander, because the issue on the merits will not be addressed until a class with an interest in the outcome has been certified. The "relation back" principle, a traditional equitable doctrine applied to class certification claims in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), serves logically to distinguish this case from the one brought a day after the prisoner is released. See *post*, at 420–421, n. 15. If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action.

[12] See, *e. g.*, Comment, A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions, 54 Texas L. Rev. 1289, 1331–1332 (1976); Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 602–608.

tifying subclasses *sua sponte*. Petitioners strenuously contend that placing the burden of identifying and constructing subclasses on the trial court creates unmanageable difficulties. Brief for Petitioners 43–51. We feel that the Court of Appeals' decision here does not impose undue burdens on the district courts. Respondent had no real opportunity to request certification of subclasses after the class he proposed was rejected. The District Court denied class certification at the same time it rendered its adverse decision on the merits. Requesting subclass certification at that time would have been a futile act. The District Court was not about to invest effort in deciding the subclass question after it had ruled that no relief on the merits was available. The remand merely gives respondent the opportunity to perform his function in the adversary system. On remand, however, it is not the District Court that is to bear the burden of constructing subclasses. That burden is upon the respondent and it is he who is required to submit proposals to the court. The court has no *sua sponte* obligation so to act. With this modification, the Court of Appeals' remand of the case for consideration of subclasses was a proper disposition.

It would be inappropriate for this Court to reach the merits of this controversy in the present posture of the case. Our holding that the case is not moot extends only to the appeal of the class certification denial. If the District Court again denies class certification, and that decision is affirmed, the controversy on the merits will be moot. Furthermore, although the Court of Appeals commented upon the merits for the sole purpose of avoiding waste of judicial resources, it did not reach a final conclusion on the validity of the guidelines. Rather, it held only that summary judgment was improper and remanded for further factual development. Given the interlocutory posture of the case before us, we must defer decision on the merits of respondent's case until after it is determined affirmatively that a class properly can be certified.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App. 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 400–402. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 402–404. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante*, at 396. There

is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante*, at 402. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

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[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 260–261 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). Each of these cases rejects the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. *Ante*, at 404–407, n. 11; *Flast* v. *Cohen*, 392 U. S. 83, 120 (1968) (Harlan, J., dissenting); see also *United States* v. *Richardson*, 418 U. S. 166, 180 (1974) (POWELL, J., concurring). Until today, however, that view never had commanded a majority.

[2] See, *e. g., Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 397; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense " 'must be extant at all stages of review.' " *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer " 'touc[h] the legal relations of parties having adverse legal interests' " are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, *supra*, at 401, n. 9; *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the

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(1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727, 736–738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533, p. 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

necessary individual interest in the outcome. See *DeFunis* v. *Odegaard, supra,* at 316. Collateral consequences of the original wrong may supply the individual interest in some circumstances. *Sibron* v. *New York,* 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115 (1974); *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing to which "the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968) (emphasis deleted).[5] We have insisted upon the personal stake requirement in mootness and standing cases because it is embedded in the case-or-controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin, supra,* at 498. In this

[5] The Court states that "the erosion of the strict, formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." *Ante,* at 404–405, 406, n. 11. It fails, however, to cite a single Court opinion in support of either statement. To the extent that the decision in *Flast* v. *Cohen, supra,* supports the position ascribed to it in the dissent, 392 U. S., at 117–120, it does not survive the long line of express holdings that began with *Warth* v. *Seldin, supra,* and were reaffirmed only last Term. *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 99 (1979). See nn. 1 and 2, *supra.* Even before *Warth,* Professor Davis observed that the personal stake requirement had no exceptions. 35 U. Chi. L. Rev., at 616, 617.

way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 60 (BRENNAN, J., concurring in judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1972).

## II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may [not] seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interest asserted by [the named plaintiff]." *Sosna* v. *Iowa*, *supra*, at 399. "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa*, *supra*, at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[6] In the words of his own

[6] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante*, at 402.

Several prisoners now in federal custody have filed a motion to intervene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his

lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[7] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and constructs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without attempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante*, at 400, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. 326. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante*, at 400. *Sosna* itself is cited for the proposition that the requirements of Art. III may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 404. In my view, the Court misreads these precedents.

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petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977).

[7] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is dismissed as moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg. 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S., at 240.[8] And in *Gerstein*, the Court applied a rule long established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "that

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[8] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (c); 3 H. Newberg, Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the court may seek a substitute representative or even decertify the class. Fed. Rules Civ. Proc. 23 (c)(1), 23 (d); see 1 Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[9]

*McDonald* and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[10] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[11] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*,

[9] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher* v. *Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

[10] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[11] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper* the Court holds that the named plaintiffs, who have refused to accept proffered individual settlements, retain a personal stake in sharing anticipated litigation costs with the class. *Ante*, at 334, n. 6, 336. Finding that Art. III is satisfied by this alleged economic interest, *Roper* reasons that the rules of federal practice governing appealability permit a party to obtain review of certain procedural rulings that are collateral to a generally favorable judgment. See *ante*, at 333–334, 336. The Court concludes that the denial of class certification falls within this category, as long as the named plaintiffs "assert a continuing stake in the outcome of the appeal." *Ante*, at 336.

It is far from apparent how *Roper* can be thought to support the decision in this case. Indeed, the opinion by THE CHIEF JUSTICE in *Roper* reaffirms the obligation of a federal court to dismiss an appeal when the parties no longer retain the personal stake in the outcome required by Art. III. *Ibid.* Here, there is not even a speculative interest in sharing costs, and respondent affirmatively denies that he retains any stake or personal interest in the outcome of his appeal. See *supra*, at 413–414. Thus, a fact that was critical to the analysis in *Roper* is absent in this case. One can disagree with that analysis yet conclude that *Roper* affords no support for the Court's ruling here.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430

(1976). As they are about to become second-class precedents, these cases are relegated to a footnote. *Ante*, at 400–401, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long-settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[12] Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the

[12] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 754, n. 6, 755–756 (1976); see *Kremens* v. *Bartley*, 431 U. S. 119, 129–130 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, *supra*, at 402, 403; see *Bell* v. *Wolfish*, 441 U. S. 520, 526, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs*, and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[13] The Court rejects that principle today.

## III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante*, at 404, 408. But respondent is said to

[13] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g.*, *Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson*, 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.*; see n. 2, *supra*, and accompanying text.

have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question.[14] Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante*, at 403.[15]

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[14] In a footnote, *ante*, at 406, n. 11, the Court states:

"This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal-stake requirement if damages were sought. See, *e. g.*, *Powell* v. *McCormack*, 395 U. S., at 495–500."

This appears to be a categorical claim of the actual, concrete injury our cases have required. Yet, again, the Court fails to identify the injury. The reference to damages is irrelevant here, as respondent sought no damages—only injunctive and declaratory relief. Moreover, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. If the Court seriously is claiming concrete injury "at all stages of review," see *supra*, at 411, it would be helpful for it to identify specifically this injury that was not apparent to respondent's counsel. Absent such identification, the claim of injury is indeed an empty one.

[15] The Court attempts to limit the sweeping consequences that could flow from the application of these criteria, see *infra*, at 421–422, and n. 18, by asserting that "[e]ach case must be decided on its own facts" on the basis of "practicalities and prudential considerations." *Ante*, at 406, n. 11. The Court long has recognized a difference between the prudential and constitutional aspects of the standing and mootness doctrines. See *supra*, at 410. I am not aware that the Court, until today, ever has merged these considerations for the purpose of eliminating the Art. III requirement of a

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not confer federal-court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S., at 100; *O'Shea* v. *Littleton,* 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison,* 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin,* 422 U. S., at 501; *Sierra Club* v. *Morton,* 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in " 'cases confessedly within [the Court's] jurisdiction.' " *Franks* v. *Bowman Transportation Co.,* 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen,* 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[16] Indeed, each of these characteristics is

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personal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Art. III analysis, cannot justify today's holding as none whatever would flow from a finding of mootness. See n. 18, *infra.* Nor does the Court's reliance upon a " 'relation back' principle," *ante,* at 407, n. 11, further the analysis. Although this fiction may provide a shorthand label for the Court's conclusion, it is hardly a principle and certainly not a limiting one.

[16] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g., Richardson* v. *Ramirez,* 418 U. S., at 35–36; *Hall* v. *Beals,* 396 U. S. 45, 48–49 (1969) (*per curiam*).

sure to be present in the typical "private attorney general" action brought by a public-spirited citizen.[17] Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[18]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante*, at 402. But the Court has created a false dilemma. As noted in *Roper*, class certification issues are "ancillary to the litigation of substantive claims." *Ante*,

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[17] The Court's assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante*, at 403. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might terminate the action. App. 17; Brief for Respondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante*, at 403. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[18] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly after the named plaintiff's release from prison. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

at 332. Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different " 'means for presenting a case or controversy *otherwise cognizable by the federal courts.*' " *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S., at 240 (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[19] But it

[19] I do not imply that the result reached today is necessary in any way to the continued vitality of the class action device. On the contrary, the practical impact of mootness in this case would be slight indeed. See n. 18, *supra.* And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "buy off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper, ante,* at 339. Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[20]

## IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[21]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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[20] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 408. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits provides no excuse for his subsequent failure to present a subclass proposal to the District Court.

[21] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

Syllabus

# MOBIL OIL CORP. *v.* COMMISSIONER OF TAXES OF VERMONT

APPEAL FROM THE SUPREME COURT OF VERMONT

No. 78-1201. Argued November 7, 1979—Decided March 19, 1980

Appellant is a corporation organized under the laws of New York, where it has its principal place of business and its "commercial domicile." It does business in many States, including Vermont, where it engages in the wholesale and retail marketing of petroleum products. Vermont imposed a corporate income tax, calculated by means of an apportionment formula, upon "foreign source" dividend income received by appellant from its subsidiaries and affiliates doing business abroad. Appellant challenged the tax on the grounds, *inter alia*, that it violated the Due Process Clause of the Fourteenth Amendment and the Commerce Clause, but the tax ultimately was upheld by the Vermont Supreme Court.

*Held:*

1. The tax does not violate the Due Process Clause. There is a sufficient "nexus" between Vermont and appellant to justify the tax, and neither the "foreign source" of the income in question nor the fact that it was received in the form of dividends from subsidiaries and affiliates precludes its taxability. Appellant failed to establish that its subsidiaries and affiliates engage in business activities unrelated to its sale of petroleum products in Vermont, and accordingly it has failed to sustain its burden of proving that its "foreign source" dividends are exempt, as a matter of due process, from fairly apportioned income taxation by Vermont. Pp. 436–442.

2. Nor does the tax violate the Commerce Clause. Pp. 442–449.

(a) The tax does not impose a burden on interstate commerce by virtue of its effect relative to appellant's income tax liability in other States. Assuming that New York, the State of "commercial domicile," has the authority to impose some tax on appellant's dividend income, there is no reason why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. The income bears relation to benefits and privileges conferred by several States, and in these circumstances apportionment, rather than allocation, is ordinarily the accepted method of taxation. Vermont's interest in taxing a proportionate share of appellant's divi-

dend income thus is not overridden by any interest of the State of "commercial domicile." Pp. 443–446.

(b) Nor does the tax impose a burden on foreign commerce. Appellant's argument that the risk of multiple taxation abroad requires allocation of "foreign source" income to a single situs at home, is without merit in the present context. That argument attempts to focus attention on the effect of foreign taxation when the effect of domestic taxation is the only real issue; its logic is not limited to dividend income but would apply to any income arguably earned from foreign commerce, so that acceptance of the argument would make it difficult for state taxing authorities to determine whether income does or does not have a foreign source; the argument underestimates this Court's power to correct discriminatory taxation of foreign commerce that results from multiple state taxation; and its acceptance would not guarantee a lesser domestic tax burden on dividend income from foreign sources. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, which concerned property taxation of instrumentalities of foreign commerce, does not provide an analogy for this case. Pp. 446–449.

136 Vt. 545, 394 A. 2d 1147, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 449. STEWART and MARSHALL, JJ., took no part in the consideration or decision of the case.

*Jerome R. Hellerstein* argued the cause for appellant. With him on the briefs were *John Dwight Evans, Jr.*, and *William B. Randolph*.

*Richard Johnston King* argued the cause for appellee. With him on the brief was *Gregory A. McKenzie*, Deputy Attorney General of Vermont.

*William D. Dexter* argued the cause for the Multistate Tax Commission et al. as *amici curiae* urging affirmance. With him on the brief were the Attorneys General and other officials for their respective States as follows: *J. D. McFarlane*, Attorney General of Colorado; *James Redden*, Attorney General of Oregon; *Jeff Bingaman*, Attorney General of New Mexico; *Carl R. Ajello*, Attorney General of Connecticut; *Albert R. Hausauer*, Special Assistant Attorney General of

North Dakota; *Robert B. Hanen*, Attorney General of Utah; *David H. Leroy*, Attorney General of Idaho, and *Theodore V. Spangler, Jr.*, Deputy Attorney General; *Paul L. Douglas*, Attorney General of Nebraska; *Edward G. Eiester, Jr.*, Attorney General of Pennsylvania; *Mike Greely*, Attorney General of Montana; *Warren R. Spannaus*, Attorney General of Minnesota; *Richard Gebelein*, Attorney General of Delaware; *Avrum M. Gross*, Attorney General of Alaska; and *William J. Baxley*, Attorney General of Alabama.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we are called upon to consider constitutional limits on a nondomiciliary State's taxation of income received by a domestic corporation in the form of dividends from subsidiaries and affiliates doing business abroad. The State of Vermont imposed a tax, calculated by means of an apportionment formula, upon appellant's so-called "foreign source" dividend income for the taxable years 1970, 1971, and 1972. The Supreme Court of Vermont sustained that tax.

## I

### A

Appellant Mobil Oil Corporation is a corporation organized under the laws of the State of New York. It has its principal place of business and its "commercial domicile" in New York City. It is authorized to do business in Vermont.

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**Thomas J. Houser* and *William E. Blasier* filed a brief for the National Association of Manufacturers as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *William J. Scott*, Attorney General of Illinois, *Carl R. Ajello*, Attorney General of Connecticut, *Francis X. Bellotti*, Attorney General of Massachusetts, and *Thomas D. Rath*, Attorney General of New Hampshire, for the State of Illinois et al.; and by *C. Douglas Floyd* for Standard Oil Company of California.

Briefs of *amici curiae* were filed by *George S. Koch* for the Committee on State Taxation of the Council of State Chambers of Commerce, and by *John H. Larson* and *James Dexter Clark* for the County of Los Angeles.

Mobil engages in an integrated petroleum business, ranging from exploration for petroleum reserves to production, refining, transportation, and distribution and sale of petroleum and petroleum products. It also engages in related chemical and mining enterprises. It does business in over 40 of our States and in the District of Columbia as well as in a number of foreign countries.

Much of appellant's business abroad is conducted through wholly and partly owned subsidiaries and affiliates. Many of these are corporations organized under the laws of foreign nations; a number, however, are domestically incorporated in States other than Vermont.[1] None of appellant's subsidiaries or affiliates conducts business in Vermont, and appellant's shareholdings in those corporations are controlled and managed elsewhere, presumably from the headquarters in New York City.

In Vermont, appellant's business activities are confined to wholesale and retail marketing of petroleum and related products. Mobil has no oil or gas production or refineries within the State. Although appellant's business activity in Vermont is by no means insignificant, it forms but a small part of the corporation's worldwide enterprise. According to the Vermont corporate income tax returns Mobil filed for the three taxable years in issue, appellant's Vermont sales were $8,554,200, $9,175,931, and $9,589,447, respectively; its payroll in the State was $236,553, $244,577, and $254,938, respectively; and the

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[1] Appellant has supplied the following table listing the number of foreign subsidiary (more than 50% owned) and nonsubsidiary corporations, as well as domestic nonsubsidiary corporations, of which, on December 31 of the taxable year, it owned, directly or indirectly, 5% or more of the capital stock:

| | 1970 | 1971 | 1972 |
|---|---|---|---|
| Foreign Subsidiary Corporations | 203 | 208 | 216 |
| Foreign Nonsubsidiary Corporations | 185 | 189 | 197 |
| Domestic Nonsubsidiary Corporations | 26 | 27 | 27 |

App. 82.

value of its property in Vermont was $3,930,100, $6,707,534, and $8,236,792, respectively. App. 35–36, 49–50, 63–64. Substantial as these figures are, they, too, represent only tiny portions of the corporation's total sales, payroll, and property.[2]

Vermont imposes an annual net income tax on every corporation doing business within the State. Under its scheme, net income is defined as the taxable income of the taxpayer "under the laws of the United States." Vt. Stat. Ann., Tit. 32, § 5811 (18) (1970 and Supp. 1978).[3] If a taxpayer corporation does business both within and without Vermont, the State taxes only that portion of the net income attributable to it under a three-factor apportionment formula. In order to determine that portion, net income is multiplied by a fraction representing the arithmetic average of the ratios of sales, payroll, and property values within Vermont to those of the corporation as a whole. § 5833 (a).[4]

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[2] For the same taxable years, appellant reported aggregate sales of $3,577,148,701, $3,889,353,228, and $4,049,824,161, respectively; total payroll of $380,818,887, $400,087,593, and $428,900,681, respectively; and property valued in the aggregate at $2,871,922,965, $2,995,950,125 and $3,291,757,721, respectively. *Id.*, at 35, 49, 63. For 1972, which is not unrepresentative, the ratios of appellant's Vermont sales, payroll, and property to its sales, payroll, and property "everywhere" were approximately .24%, .06% and .25%, respectively. *Id.*, at 63, 64.

[3] Section 5811 (18) states in pertinent part:

"'Vermont net income' means, for any taxable year and for any corporate taxpayer, the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states."

[4] Section 5833 (1970 and Supp. 1978) provides in pertinent part:

"(a) . . . If the income of a taxable corporation is derived from any trade, business, or activity conducted both within and without this state, the amount of the corporation's Vermont net income which shall be apportioned to this state, so as to allocate to this state a fair and equitable portion of that income, shall be determined by multiplying that Vermont net income by the arithmetic average of the following factors:

"(1) The average of the value of all the real and tangible property within this state (A) at the beginning of the taxable year and (B) at the

Appellant's net income for 1970, 1971, and 1972, as defined by the Federal Internal Revenue Code, included substantial amounts received as dividends from its subsidiaries and affiliates operating abroad. Mobil's federal income tax returns for the three years showed taxable income of approximately $220 million, $308 million, and $233 million, respectively, of which approximately $174 million, $283 million, and $280 million was net dividend income.[5] On its Vermont returns for these years, however, appellant subtracted from federal taxable income items it regarded as "nonapportionable," including the net dividends. As a result of these subtractions, Mobil's Vermont returns showed a net income of approximately $23 million for 1970 and losses for the two succeeding years. After application of Vermont's apportionment formula, an aggregate tax liability of $1,871.90 to Vermont remained for the 3-year period; except for a minimum tax of $25 for each of 1971 and 1972, all of this was attributable to 1970.[6]

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end of the taxable year . . . expressed as a percentage of all such property both within and without this state;

"(2) The total wages, salaries, and other personal service compensation paid during the taxable year to employees within this state, expressed as a percentage of all such compensation paid whether within or without this state;

"(3) The gross sales, or charges for services performed, within this state, expressed as a percentage of such sales or charges whether within or without this state."

[5] This information is taken from appellant's Vermont income tax returns, to which copies of its federal returns were attached. App. 33–73.

It appears that the major share of appellant's dividend income for the three years was received from three wholly owned subsidiaries incorporated abroad (Mobil Marine Transportation, Ltd.; Mobil Oil Iraq with Limited Liability; and Pegasus Overseas, Ltd.) and from one affiliate incorporated in Delaware (Arabian American Oil Co. (ARAMCO)) of which appellant owned 10% of the capital stock. *Id.*, at 75–78.

[6] Appellant subtracted amounts representing interest and foreign taxes as well as dividends. It no longer presses its claim that interest and taxes should have been excluded from Vermont's preapportionment tax

The Vermont Department of Taxes recalculated appellant's income by restoring the asserted nonapportionable items to the preapportionment tax base. It determined that Mobil's

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base. Appellant's original calculations for the years in question were as follows:

| | | |
|---|---|---|
| **Year 1970** | | |
| Federal Taxable Income | | $220,035,244.23 |
| Less: | | |
| Nonapportionable Income | | |
| Dividends | $174,211,073.60 | |
| Interest | 10,520,792.51 | |
| Foreign Taxes | 12,221,476.88 | |
| Total | | 196,953,342.99 |
| Apportionable Income | | $23,081,901.24 |
| Net Income Allocable to Vermont | | 30,361.11 |
| Total Vermont Tax | | $1,821.67 |
| **Year 1971** | | |
| Federal Taxable Income | | $308,253,570.02 |
| Less: | | |
| Nonapportionable Income | | |
| Dividends | $282,817,008.65 | |
| Interest | 12,609,826.23 | |
| Foreign Taxes | 34,659,576.05 | |
| Total | | 330,086,410.93 |
| Apportionable Income | | ($21,832,840.91) |
| Net Income Allocable to Vermont | | 0.00 |
| Total Vermont Tax (minimum tax) | | $25.00 |
| **Year 1972** | | |
| Federal Taxable Income | | $232,825,728.27 |
| Less: | | |
| Nonapportionable Income | | |
| Dividends | $280,623,403.93 | |
| Interest | 3,905,208.04 | |
| Foreign Taxes | 38,260,249.40 | |
| Total | | $322,788,861.37 |
| Apportionable Income | | ($89,963,133.20) |
| Net Income Allocable to Vermont | | 0.00 |
| Total Vermont Tax (minimum tax) | | $25.00 |

App. 37, 34; 51, 48; 65, 62.

aggregate tax liability for the three years was $76,418.77, and deficiencies plus interest were assessed accordingly.[7] Appellant challenged the deficiency assessments before the Commissioner of Taxes. It argued, among other things, that taxation of the dividend receipts under Vermont's corporate income tax violated the Due Process Clause of the Fourteenth Amendment, as well as the Interstate and Foreign Commerce Clause, U. S. Const., Art. I, § 8, cl. 3. Appellant also argued that inclusion of the dividend income in its tax base was inconsistent with the terms of the Vermont tax statute, because it would not result in a "fair" and "equitable" apportionment, and it petitioned for modification of the apportionment. See Vt. Stat. Ann., Tit. 32, § 5833 (b) (1970 and Supp. 1978).[8] It is evident from the transcript of the hearing before the Commissioner that appellant's principal object was to achieve the subtraction of the asserted nonapportionable income from the preapportionment tax base; the alternative request for modification of the apportionment formula went largely undeveloped. See App. 18–31.

The Commissioner held that inclusion of dividend income

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[7] The Department calculated Mobil's tax liability for 1970 at $19,078.56; for 1971 at $31,955.52; and for 1972 at $25,384.69. App. to Juris. Statement 1a.

[8] Section 5833 (b) provides:

"If the application of the provisions of this section does not fairly represent the extent of the business activities of a corporation within this state, the corporation may petition for, or the commissioner may require, with respect to all or any part of the corporation's business activity, if reasonable:

"(1) Separate accounting;

"(2) The exclusion or modification of any or all of the factors;

"(3) The inclusion of one or more additional factors which will fairly represent the corporation's business activity in this state; or

"(4) The employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income."

By amendment effected by 1971 Vt. Laws, No. 73, § 16, the words "any or all" in subsection (2) replaced the words "either or both."

in the tax base was required by the Vermont statute, and he rejected appellant's Due Process Clause and Commerce Clause arguments.[9]

Mobil sought review by the Superior Court of Washington County. That court reversed the Commissioner's ruling. It held that inclusion of dividend income in the tax base unconstitutionally subjected appellant to prohibitive multiple taxation because New York, the State of appellant's commercial domicile, had the authority to tax the dividends in their entirety. Since New York could tax without apportionment, the court concluded, Vermont's use of an apportionment formula would not be an adequate safeguard against multiple taxation. It agreed with appellant that subtraction of dividend income from the Vermont tax base was the only acceptable approach. App. to Juris. Statement 14a.

The Commissioner, in his turn, appealed to the Supreme Court of Vermont. That court reversed the judgment of the Superior Court. 136 Vt. 545, 394 A. 2d 1147 (1978). The court noted that appellant's quarrel was with the calculation of the tax base and not with the method or accuracy of the statutory apportionment formula. *Id.*, at 547, 394 A. 2d, at 1148. It found a sufficient "nexus" between the corporation and the State to justify an apportioned tax on both appel-

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[9] In reaching this decision, the Commissioner followed *F. W. Woolworth Co.* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A. 2d 839 (1972), and *Gulf Oil Corp.* v. *Morrison*, 120 Vt. 324, 141 A. 2d 671 (1958). App. to Juris. Statement 6a–7a, 9a–11a. He also rejected, for lack of proof, Mobil's petition for modification of the apportionment formula:

"Any diversion from the standard formula imposes a strong burden of proof on the taxpayer to show that the formula does not fairly represent its business activities in the State of Vermont. . . . Mobil has made no such showing in this case." *Id.*, at 11a.

The Commissioner did allow a modification of the method of dividend "gross-up" for the year 1970 in a manner consistent with *F. W. Woolworth Co.* v. *Commissioner of Taxes*, 133 Vt. 93, 328 A. 2d 402 (1974). This modification is not germane to the present controversy.

lant's investment income and its operating income.[10] The court rejected the "multiple taxation" theory that had prevailed in the Superior Court. In its view, appellant had failed to prove that multiple taxation would actually ensue. New York did not tax the dividend income during the taxable years in question, and "[i]n a conflict between Vermont's apportioned tax on Mobil's investment income and an attempt on New York's part to tax that same income without apportionment, New York might very well have to yield." *Id.*, at 552, 394 A. 2d, at 1151. Accordingly, the court held that no constitutional defect had been established. It remanded the case for reinstatement of the deficiency assessments.

The substantial federal question involved prompted us to note probable jurisdiction. 441 U. S. 941 (1979).

B

In keeping with its litigation strategy, appellant has disclaimed any dispute with the accuracy or fairness of Vermont's apportionment formula. See Juris. Statement 10; Brief for Appellant 11. Instead, it claims that dividends from a "foreign source" by their very nature are not apportionable income.[11] This election to attack the tax base rather than the formula substantially narrows the issues before us. In deciding this appeal, we do not consider whether application of Vermont's formula produced a fair attribution of appellant's dividend income to that State. Our inquiry is confined

[10] The Court also observed, 136 Vt., at 547–548, 394 A. 2d, at 1149, that due process contentions similar to those advanced by Mobil here had been rejected in two Vermont cases that came down after the decision in the present case in the Superior Court. *In re Goodyear Tire & Rubber Co.*, 133 Vt. 132, 335 A. 2d 310 (1975); *F. W. Woolworth Co.* v. *Commissioner of Taxes*, 133 Vt. 93, 328 A. 2d 402 (1974).

[11] The dissent raises *de novo* the issue of appellant's dividend receipts from stockholdings in corporations that apparently operate principally in the United States. See *post*, at 455–457, 460–461. This issue is not encompassed in the questions presented by appellant. See Juris. Statement 2–3.

to the question whether there is something about the character of income earned from investments in affiliates and subsidiaries operating abroad that precludes, as a constitutional matter, state taxation of that income by the apportionment method.

In addressing this question, moreover, it is necessary to bear in mind that Mobil's "foreign source" dividend income is of two distinct types. The first consists of dividends from domestic corporations, organized under the laws of States other than Vermont, that conduct all their operations, and hence earn their income, outside the United States.[12] The second type consists of dividends from corporations both organized and operating abroad. The record in this case fails to supply much detail concerning the activities of the corporations whose dividends allegedly fall into these two categories, but it is apparent, from perusal of such documents in the record as appellant's corporate reports for the years in question, that many of these subsidiaries and affiliates, including the principal contributors to appellant's dividend income, engage in business activities that form part of Mobil's integrated petroleum enterprise. Indeed, although appellant is unwilling to concede the legal conclusion that these activities form part of a "unitary business," see Reply Brief for Appellant 2, n. 1, it has offered no evidence that would undermine the conclusion that most, if not all, of its subsidiaries and affiliates contribute to appellant's worldwide petroleum enterprise.

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[12] Under the Vermont tax scheme, income falling into this category is subject to apportionment only in part. Because Vermont's statute is geared to the definition of taxable income under federal law, it excludes from the preapportionment tax base 85% of all dividends earned from domestic corporations in which the taxpayer owns less than 80% of the capital stock, and 100% of all dividends earned from domestic corporations in which the taxpayer owns 80% or more of the capital stock. See § 243 of the Internal Revenue Code of 1954, as amended, 26 U. S. C. § 243; Vt. Stat. Ann., Tit. 32, § 5811 (18) (1970 and Supp. 1978).

To justify exclusion of the dividends from income subject to apportionment in Vermont, Mobil offers three principal arguments. First, it argues that the dividends may not be taxed in Vermont because there is no "nexus" between that State and either appellant's management of its investments or the business activities of the payor corporations. Second, it argues that taxation of the dividends in Vermont would create an unconstitutional burden of multiple taxation because the dividends would be taxable in full in New York, the State of commercial domicile. In this context, appellant relies on the traditional rule that dividends are taxable at their "business situs," a rule which it suggests is of constitutional dimension. Third, Mobil argues that the "foreign source" of the dividends precludes state income taxation in this country, at least in States other than the commercial domicile, because of the risk of multiple taxation at the international level. In a related argument, appellant contends that local taxation of the sort undertaken in Vermont prevents the Nation from speaking with a single voice in foreign commercial affairs. We consider each of these arguments in turn.

## II

It long has been established that the income of a business operating in interstate commerce is not immune from fairly apportioned state taxation. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458–462 (1959); *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120 (1920); *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328–329 (1918). "[T]he entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S., at 460. For a State to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment imposes two requirements: a "minimal connection" be-

tween the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise. *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272–273 (1978); see *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U. S. 753, 756 (1967); *Norfolk & Western R. Co.* v. *Missouri Tax Comm'n*, 390 U. S. 317, 325 (1968). The requisite "nexus" is supplied if the corporation avails itself of the "substantial privilege of carrying on business" within the State; and "[t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445 (1940).

We do not understand appellant to contest these general principles. Indeed, in its Vermont tax returns for the years in question, Mobil included all its operating income in apportionable net income, without regard to the locality in which it was earned. Nor has appellant undertaken to prove that the amount of its tax liability as determined by Vermont is "out of all appropriate proportion to the business transacted by the appellant in that State." *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123, 135 (1931).[13] What appellant does seek to establish, in the due process phase of its argument, is that its *dividend* income must be excepted from the general principle of apportionability because it lacks a satisfactory nexus with appellant's business activities in Vermont. To carve that out as an exception, appellant must demonstrate something about the nature of this income that distinguishes it from operating income, a

[13] Application of the Vermont three-factor formula for the three years resulted in attributing to the State the following percentages of the corporation's net income:

| | |
|---|---|
| 1970 | 0.146032% |
| 1971 | 0.173647% |
| 1972 | 0.182151% |

App. 36, 50, 64.

proper portion of which the State concededly may tax. From appellant's argument we discern two potential differentiating factors: the "foreign source" of the income, and the fact that it is received in the form of dividends from subsidiaries and affiliates.

The argument that the source of the income precludes its taxability runs contrary to precedent. In the past, apportionability often has been challenged by the contention that income earned in one State may not be taxed in another if the source of the income may be ascertained by separate geographical accounting. The Court has rejected that contention so long as the intrastate and extrastate activities formed part of a single unitary business. See *Butler Bros.* v. *McColgan*, 315 U. S. 501, 506–508 (1942); *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 336 (1939); cf. *Moorman Mfg. Co.* v. *Bair*, 437 U. S., at 272. In these circumstances, the Court has noted that separate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. *Butler Bros.* v. *McColgan*, 315 U. S., at 508–509. Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable "source." Although separate geographical accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required.

The Court has applied the same rationale to businesses operating both here and abroad. *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271 (1924), is the leading example. A British corporation manufactured ale in Great Britain and sold some of it in New York. The corporation objected on due process grounds to New York's imposition of an apportioned franchise tax on the corporation's net income. The Court sustained the tax on the strength of its earlier decision in *Underwood Typewriter Co.* v. *Chamberlain*, *supra*,

where it had upheld a similar tax as applied to a business operating in several of our States. It ruled that the brewer carried on a unitary business, involving "a series of transactions beginning with the manufacture in England and ending in sales in New York and other places," and that "the State was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business." 266 U. S., at 282.

As these cases indicate, the linchpin of apportionability in the field of state income taxation is the unitary-business principle.[14] In accord with this principle, what appellant must show, in order to establish that its dividend income is not subject to an apportioned tax in Vermont, is that the income was earned in the course of activities unrelated to the sale of petroleum products in that State. *Bass, Ratcliff & Gretton* forecloses the contention that the foreign source of the dividend income alone suffices for this purpose. Moreover, appellant has made no effort to demonstrate that the foreign operations of its subsidiaries and affiliates are distinct in any business or economic sense from its petroleum sales activities in Vermont. Indeed, all indications in the record are to the contrary, since it appears that these foreign activities are part of appellant's integrated petroleum enterprise. In the absence of any proof of discrete business enterprise, Vermont was entitled to conclude that the dividend income's

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[14] See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 473–474, nn. 25, 26 (1978). For scholarly discussions of the unitary-business concept see G. Altman & F. Keesling, Allocation of Income in State Taxation 97–102 (2d ed. 1950); Dexter, Taxation of Income from Intangibles of Multistate-Multinational Corporations, 29 Vand. L. Rev. 401 (1976); Hellerstein, Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business, 21 Nat. Tax J. 487, 496 (1968); Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 Hastings L. J. 42 (1960); Rudolph, State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups, 25 Tax L. Rev. 171 (1970).

foreign source did not destroy the requisite nexus with in-state activities.

It remains to be considered whether the form in which the income was received serves to drive a wedge between Mobil's foreign enterprise and its activities in Vermont. In support of the contention that dividend income ought to be excluded from apportionment, Mobil has attempted to characterize its ownership and management of subsidiaries and affiliates as a business distinct from its sale of petroleum products in this country. Various *amici* also have suggested that the division between parent and subsidiary should be treated as a break in the scope of unitary business, and that the receipt of dividends is a discrete "taxable event" bearing no relation to Vermont.

At the outset, we reject the suggestion that anything is to be gained by characterizing receipt of the dividends as a separate "taxable event." In *Wisconsin* v. *J. C. Penney Co.*, *supra*, the Court observed that "tags" of this kind "are not instruments of adjudication but statements of result," and that they add little to analysis. 311 U. S., at 444. Mobil's business entails numerous "taxable events" that occur outside Vermont. That fact alone does not prevent the State from including income earned from those events in the preapportionment tax base.

Nor do we find particularly persuasive Mobil's attempt to identify a separate business in its holding company function. So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability.

Superficially, intercorporate division might appear to be a more attractive basis for limiting apportionability. But the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise. Had

appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp.* v. *Washington*, 377 U. S. 436, 441 (1964). Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives.[15]

We do not mean to suggest that all dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does

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[15] In its reply brief, Mobil submits a new due process argument based on Vermont's failure to require "combined apportionment" which, while including the income of subsidiaries and affiliates as part of appellant's net income, would eliminate intercorporate transfers, such as appellant's dividend income, from that calculation. A necessary concomitant of this would be inclusion of the subsidiaries' and affiliates' sales, payroll, and property in the calculation of the apportionment formula. Reply Brief for Appellant 1–6. The result, presumably, would be advantageous to appellant, since virtually nothing would be added to the "Vermont" numerators of the apportionment factors, while there would be substantial increases in the "everywhere" denominators, resulting in a diminution of the apportionment fraction.

This argument appears to be an afterthought that was not presented to the Vermont tax authorities or to the courts of that State. The evidence in the record surely is inadequate to evaluate the effect of the proposal, its relative impact on appellant, or its potential implications. Moreover, the principal focus of this suggestion is the apportionment formula, not the apportionability of foreign source income. Appellant, we reiterate, took this appeal on the assumption that Vermont's apportionment formula was fair. At this juncture and on these facts, we need not, and do not, decide whether combined apportionment of this type is constitutionally required. In any event, we note that appellant's latter-day advocacy of this combined approach virtually concedes that income from foreign sources, produced by the operations of subsidiaries and affiliates, as a matter of due process is attributable to the parent and amenable to fair apportionment. That is all we decide today.

business. Where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business. We need not decide, however, whether Vermont's tax statute would reach extraterritorial values in an instance of that kind. Cf. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S., at 121. Mobil has failed to sustain its burden of proving any unrelated business activity on the part of its subsidiaries and affiliates that would raise the question of nonapportionability. See *Norton Co.* v. *Department of Revenue*, 340 U. S. 534, 537 (1951); *Butler Bros.* v. *McColgan*, 315 U. S., at 507.[16] We therefore hold that its foreign-source dividends have not been shown to be exempt, as a matter of due process, from apportionment for state income taxation by the State of Vermont.

## III

In addition to its due process challenge, appellant contends that Vermont's tax imposes a burden on interstate and foreign commerce by subjecting appellant's dividend income to a substantial risk of multiple taxation. We approach this argument in two steps. First, we consider whether there was a burden on interstate commerce by virtue of the effect of the Vermont tax relative to appellant's income tax liability in

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[16] The dissent argues that unrelated business activity is "readily apparent" from the record because "a large number of the corporations . . . from which [Mobil] derived significant dividend income *would seem* neither to be engaged in the petroleum business nor to have any connection whatsoever with Mobil's marketing business in Vermont." *Post*, at 460 (emphasis added). The only evidence advanced in support of this assertion is a list of the names of corporations whose dividend payments are not at issue. See n. 11, *supra*. Furthermore, it may bear repeating that the burden of proof rests upon the appellant and not upon the Commissioner of Taxes. The absence of evidence in the record to decide the issues on which the dissent speculates, *post*, at 460–461, cuts against and not in favor of appellant's cause.

other States. Next, we determine whether constitutional protections for foreign commerce pose additional considerations that alter the result.

A

The effect of the Commerce Clause on state taxation of interstate commerce is a frequently litigated subject that appears to be undergoing a revival of sorts.[17] In several recent cases, this Court has addressed the issue and has attempted to clarify the apparently conflicting precedents it has spawned. See, *e. g.*, *Moorman Mfg. Co.* v. *Bair*, 437 U. S., at 276–281; *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734, 743–751 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977). In an endeavor to establish a consistent and rational method of inquiry, we have examined the practical effect of a challenged tax to determine whether it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.*, at 279.

Appellant asserts that Vermont's tax is discriminatory because it subjects interstate business to a burden of duplicative taxation that an intrastate taxpayer would not bear. Mobil does not base this claim on a comparison of Vermont's apportionment formula with those used in other States where appellant pays income taxes. Cf. *Moorman Mfg. Co.* v. *Bair*, *supra*; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255–256 (1938). Rather, it contends that *any* appor-

[17] In particular, there has been a flurry of litigation in state courts over the Commerce Clause implications of apportioned taxation of income from intangibles. See, *e. g.*, *Qualls* v. *Montgomery Ward & Co.*, 266 Ark. 207, 585 S. W. 2d 18 (1979); *American Smelting & Refining Co.* v. *Idaho Tax Comm'n*, 99 Idaho 924, 592 P. 2d 39 (1979), appeal docketed *sub nom. ASARCO Inc.* v. *Idaho Tax Comm'n*, No. 78–1839; *W. R. Grace & Co.* v. *Commissioner of Revenue*, 378 Mass. 577, 393 N. E. 2d 330 (1979); *Montana Dept. of Revenue* v. *American Smelting & Refining Co.*, 173 Mont. 316, 567 P. 2d 901 (1977), appeal dism'd, 434 U. S. 1042 (1978).

tioned tax on its dividends will place an undue burden on that specific source of income, because New York, the State of commercial domicile, has the power to tax dividend income without apportionment. For the latter proposition, appellant cites property tax cases that hold that intangible property is to be taxed either by the State of commercial domicile or by the State where the property has a "business situs." See, *e. g., First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234, 237 (1937); *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 208–210 (1936); *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385, 396 (1903); cf. *New York ex rel. Whitney* v. *Graves,* 299 U. S. 366, 372–373 (1937).

Inasmuch as New York does not presently tax the dividends in question, actual multiple taxation is not demonstrated on this record. The Vermont courts placed some reliance on this fact, see, *e. g.,* 136 Vt., at 548, 394 A. 2d, at 1149, and much of the debate in this Court has aired the question whether an actual burden need be shown. Compare *Standard Pressed Steel Co.* v. *Department of Revenue,* 419 U. S. 560, 563–564 (1975), and *Freeman* v. *Hewit,* 329 U. S. 249, 256 (1946), with *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S., at 462–463, and *Northwest Airlines, Inc.* v. *Minnesota,* 322 U. S. 292 (1944). See also *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434, 452, n. 17 (1979). We agree with Mobil that the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy. But the absence of any existing duplicative tax does alter the nature of appellant's claim. Instead of seeking relief from a present tax burden, appellant seeks to establish a theoretical constitutional preference for one method of taxation over another. In appellant's view, the Commerce Clause requires allocation of dividend income to a single situs rather than apportionment among the States.

Taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former

cannot be sustained. See *Standard Oil Co.* v. *Peck*, 342 U. S. 382, 384 (1952). We find no adequate justification, however, for such a preference. Although a fictionalized situs for intangible property sometimes has been invoked to avoid multiple taxation of ownership, there is nothing talismanic about the concepts of "business situs" or "commercial domicile" that automatically renders those concepts applicable when taxation of income from intangibles is at issue. The Court has observed that the maxim *mobilia sequuntur personam*, upon which these fictions of situs are based, "states a rule without disclosing the reasons for it." *First Bank Stock Corp.* v. *Minnesota*, 301 U. S., at 241. The Court also has recognized that "the reason for a single place of taxation no longer obtains" when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction. *Curry* v. *McCanless*, 307 U. S. 357, 367 (1939). Even for property or franchise taxes, apportionment of intangible values is not unknown. See *Ford Motor Co.* v. *Beauchamp*, 308 U. S., at 335–336; *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185, 222 (1897). Moreover, cases upholding allocation to a single situs for property tax purposes have distinguished income tax situations where the apportionment principle prevails. See *Wheeling Steel Corp.* v. *Fox*, 298 U. S., at 212.

The reasons for allocation to a single situs that often apply in the case of property taxation carry little force in the present context. Mobil no doubt enjoys privileges and protections conferred by New York law with respect to ownership of its stock holdings, and its activities in that State no doubt supply some nexus for jurisdiction to tax. Cf. *First Bank Stock Corp.* v. *Minnesota*, 301 U. S., at 240–241. Although we do not now presume to pass on the constitutionality of a hypothetical New York tax, we may assume, for present purposes, that the State of commercial domicile has the authority to lay some tax on appellant's dividend income as well as on the value of its stock. But there is no reason in theory why

that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. These are the circumstances in which apportionment is ordinarily the accepted method. Since Vermont seeks to tax income, not ownership, we hold that its interest in taxing a proportionate share of appellant's dividend income is not overridden by any interest of the State of commercial domicile.

B

What has been said thus far does not fully dispose of appellant's additional contention that the Vermont tax imposes a burden on foreign commerce. Relying upon the Court's decision last Term in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979), Mobil suggests that dividends from foreign sources must be allocated to the State of commercial domicile, even if dividends from subsidiaries and affiliates operating domestically are not. By accepting the power of the State of commercial domicile to tax foreign-source dividend income, appellant eschews the broad proposition that foreign-source dividends are immune from state taxation. It presses the narrower contention that, because of the risk of multiple taxation abroad, allocation of foreign-source income to a single situs is required at home. Appellant's reasoning tracks the rationale of *Japan Line*, that is, that allocation is required because apportionment necessarily entails some inaccuracy and duplication. This inaccuracy may be tolerable for businesses operating solely within the United States, it is said, because this Court has power to correct any gross overreaching. The same inaccuracy, however, becomes intolerable when it is added to the risk of duplicative taxation abroad, which this Court is powerless to control. Accordingly, the only means of alleviating the burden of overlapping taxes is to adopt an allocation rule.

This argument is unpersuasive in the present context for

several reasons. First, it attempts to focus attention on the effect of foreign taxation when the effect of domestic taxation is the only real issue. By admitting the power of the State of commercial domicile to tax foreign-source dividends *in full*, Mobil necessarily forgoes any contention that local duplication of foreign taxes is proscribed. Thus, the only inquiry of constitutional dimension is the familiar question whether taxation by apportionment at home produces significantly greater tax burdens than taxation by allocation. Once appellant's argument is placed in this perspective, the presence or absence of taxation abroad diminishes in importance.

Second, nothing about the logic of Mobil's position is limited to dividend income. The same contention could be advanced about any income arguably earned from foreign commerce. If appellant's argument were accepted, state taxing commissions would face substantial difficulties in attempting to determine what income does or does not have a foreign source.

Third, appellant's argument underestimates the power of this Court to correct excessive taxation on the field where appellant has chosen to pitch its battle. A discriminatory effect on foreign commerce as a result of multiple state taxation is just as detectable and corrigible as a similar effect on commerce among the States. Accordingly, we see no reason why the standard for identifying impermissible discrimination should differ in the two instances.

Finally, acceptance of appellant's argument would provide no guarantee that allocation will result in a lesser domestic tax burden on dividend income from foreign sources. By appellant's own admission, allocation would give the State of commercial domicile the power to tax that income in full, without regard to the extent of taxation abroad. Unless we indulge in the speculation that a State will volunteer to become a tax haven for multinational enterprises, there is no reason to suspect that a State of commercial domicile will be any less vigorous in taxing the whole of the dividend income

than a State like Vermont will be in taxing a proportionate share.

Appellant's attempted analogy between this case and *Japan Line* strikes us as forced. That case involved ad valorem property taxes assessed directly upon instrumentalities of foreign commerce. As has been noted, the factors favoring use of the allocation method in property taxation have no immediate applicability to an income tax. *Japan Line,* moreover, focused on problems of duplicative taxation at the international level, while appellant here has confined its argument to the wholly different sphere of multiple taxation among our States. Finally, in *Japan Line* the Court was confronted with actual multiple taxation that could be remedied only by adoption of an allocation approach. As has already been explained, in the present case we are not similarly impelled.

Nor does federal tax policy lend additional weight to appellant's arguments. The federal statutes and treaties that Mobil cites, Brief for Appellant 38–43, concern problems of multiple taxation at the international level and simply are not germane to the issue of multiple state taxation that appellant has framed. Concurrent federal and state taxation of income, of course, is a well-established norm. Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States. The absence of any explicit directive to that effect is attested by the fact that Congress has long debated, but has not enacted, legislation designed to regulate state taxation of income. See H. R. Rep. No. 1480, 88th Cong., 2d Sess. (1964); H. R. Rep. No. 565, 89th Cong., 1st Sess. (1965); H. R. Rep. No. 952, 89th Cong., 1st Sess. (1965); Hearings on State Taxation of Interstate Commerce before the Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance, 93d Cong., 1st Sess. (1973); cf. *United States Steel Corp.* v. *Multistate Tax Comm'n,* 434 U. S. 452, 456, n. 4 (1978). Legislative proposals have provoked debate over issues closely related to the

present controversy. See, *e. g.*, New York State Bar Assn. Tax Section Committee on Interstate Taxation, Proposals for Improvement of Interstate Taxation Bills (H. R. 1538 and S. 317), 25 Tax Lawyer 433 (1971). Congress in the future may see fit to enact legislation requiring a uniform method for state taxation of foreign dividends. To date, however, it has not done so.

## IV

In sum, appellant has failed to demonstrate any sound basis, under either the Due Process Clause or the Commerce Clause, for establishing a constitutional preference for allocation of its foreign-source dividend income to the State of commercial domicile. Because the issue has not been presented, we need not, and do not, decide what the constituent elements of a fair apportionment formula applicable to such income would be. We do hold, however, that Vermont is not precluded from taxing its proportionate share.

The judgment of the Supreme Court of Vermont is affirmed.

*It is so ordered.*

MR. JUSTICE STEWART and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE STEVENS, dissenting.

The Court today decides one substantive question and two procedural questions. Because of the way in which it resolves the procedural issues, the Court's substantive holding is extremely narrow. It is carefully "confined to the question whether there is something about the character of income earned from investments in affiliates and subsidiaries operating abroad that precludes, as a constitutional matter, state taxation of that income by the apportionment method." *Ante*, at 434–435.[1] Since that question has long since been

[1] Moreover, in the last few sentences of n. 15, *ante*, at 441, the Court emphatically repeats that it has decided nothing more than that the Due

answered in the negative, see, *e. g., Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271, the Court's principal holding is unexceptional.

The Court's substantive holding rests on the assumed premises (1) that Mobil's investment income and its income from operations in Vermont are inseparable parts of one unitary business and (2) that the entire income of that unitary business has been accurately and fairly apportioned between Vermont and the rest of the world—assuming the constitutional validity of including any foreign income in the allocation formula. The Court holds—as I understand its opinion—that Mobil "offered no evidence" challenging the first premise,[2] and that it expressly disclaimed any attack on the second.[3]

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Process Clause does not preclude the attribution of foreign-source income to a parent and subjecting such income to fair apportionment. It states: "Appellant, we reiterate, took this appeal on the assumption that Vermont's apportionment formula was fair. At this juncture and on these facts, we need not, and do not, decide whether combined apportionment of this type is constitutionally required. In any event, we note that appellant's latter-day advocacy of this combined approach virtually concedes that income from foreign sources, produced by the operations of subsidiaries and affiliates, as a matter of due process is attributable to the parent and amenable to fair apportionment. That is all we decide today."

[2] *Ante*, at 435. See also *ante*, at 441–442:

"We do not mean to suggest that all dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does business. Where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business. We need not decide, however, whether Vermont's tax statute would reach extraterritorial values in an instance of that kind. Cf. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. [113], 121. Mobil has failed to sustain its burden of proving any unrelated business activity on the part of its subsidiaries and affiliates that would raise the question of nonapportionability."

[3] "In keeping with its litigation strategy, appellant has disclaimed any

I disagree with both of these procedural holdings. I am persuaded that the record before us demonstrates either (1) that Mobil's income from its investments and its income from the sale of petroleum products in Vermont are not parts of the same "unitary business," as that concept has developed in this Court's cases; or (2) that if the unitary business is defined to include both kinds of income, Vermont's apportionment formula has been applied in an arbitrary and unconstitutional way. To explain my position, it is necessary first to recall the limited purpose that the unitary-business concept serves in this kind of case, then to identify the two quite different formulations of Mobil's "unitary business" that could arguably support Vermont's application of its apportionment formula to Mobil's investment income, and finally to show why on this record Mobil is entitled to relief using either formulation. Because I also believe that Mobil has done nothing to waive its entitlement, I conclude that the Court's substantive holding is inadequate to dispose of Mobil's contentions.

## I

It is fundamental that a State has no power to impose a tax on income earned outside of the State.[4] The out-of-state

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dispute with the accuracy or fairness of Vermont's apportionment formula. See Juris. Statement 10; Brief for Appellant 11. Instead, it claims that dividends from a 'foreign source' by their very nature are not apportionable income. This election to attack the tax base rather than the formula substantially narrows the issues before us. In deciding this appeal, we do not consider whether application of Vermont's formula produced a fair attribution of appellant's dividend income to that State." *Ante*, at 434.

[4] As we said in *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272–273:

"The Due Process Clause places two restrictions on a State's power to tax income generated by the activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State. *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U. S. 753, 756. This requirement was plainly satisfied here. Second, the income attributed to the State for tax purposes

income of a business that operates in more than one State is subject to examination by the taxing State only because of "the impossibility of allocating specifically the profits earned by the processes conducted within its borders." *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 121. An apportionment formula is an imperfect, but nevertheless acceptable, method of measuring the in-state earnings of an integrated business. "It owes its existence to the fact that with respect to a business earning income through a series of transactions beginning with manufacturing in one State and ending with a sale in another, a precise—or even wholly logical—determination of the State in which any specific portion of the income was earned is impossible." *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 286 (POWELL, J., dissenting).

In the absence of any decision by Congress to prescribe uniform rules for allocating the income of interstate businesses to the appropriate geographical source, the Court has construed the Constitution as allowing the States wide latitude in the selection and application of apportionment formulas. See, *e. g.*, *id.*, at 278–280. Thus an acceptable formula may allocate income on the basis of the location of tangible assets,

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must be rationally related to 'values connected with the taxing State.' *Norfolk & Western R. Co.* v. *State Tax Comm'n*, 390 U. S. 317, 325."

See also Rudolph, State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups, 25 Tax L. Rev. 171, 181 (1970) (hereinafter State Taxation): "The basic proposition can be simply stated: At least as far as nondomiciliary corporations are concerned, a state may only tax income arising from sources within the state. Or, put differently, it cannot give its income tax extraterritorial effect."

To put it still differently, if, in a particular case, use of an allocation formula has the effect of taxing income earned by an interstate entity outside the State, it could alternatively be said to have the effect of taxing the income earned by that entity inside the State at a rate higher than that used for a comparable, wholly intrastate business, a discrimination that violates the Commerce Clause.

*Underwood Typewriter, supra,* on the basis of gross sales, *Moorman, supra,* or—as is more typical today—by an averaging of three factors: payroll, sales, and tangible properties. See, *e. g., Butler Bros.* v. *McColgan,* 315 U. S. 501, 505. In that case the Court explained:

> "We cannot say that property, pay roll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that these factors may properly be deemed to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income,' so as to allocate to California its just proportion of the profits earned by appellant from this unitary business. And no showing has been made that income unconnected with the unitary business has been used in the formula." *Id.,* at 509.

The justification for using an apportionment formula to measure the in-state earnings of a unitary business is inapplicable to out-of-state earnings from a source that is unconnected to the business conducted within the State. This rather obvious proposition is recognized by the commentators [5] and is noted in our opinions.[6] If a taxpayer proves by

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[5] See, *e. g.,* Keesling & Warren, The Unitary Concept In the Allocation of Income, 12 Hastings L. J. 42, 48 (1960):

"In applying the foregoing definitions, it must be kept clearly in mind that although in particular instances all the activities of a given taxpayer may constitute a single business, in other instances the activities may be segregated or divided into a number of separate businesses. It is only where the activities within and without the state constitute inseparable parts of a single business that the classification of unitary should be used."

[6] In *Butler Bros.,* the Court pointed out that no showing had been made that "income unconnected with the unitary business has been used in the formula," 315 U. S., at 509. And in *Moorman Mfg. Co., supra,* we noted:

" 'Interest, dividends, rents, and royalties (less related expenses) received in connection with business in the state, shall be allocated to the

clear and cogent evidence that the income attributed to the State by an apportionment formula is " 'out of all appropriate proportion to the business transacted . . . in that State,' " see *Moorman*, *supra*, at 274, the assessment cannot stand.

As Mr. Justice Holmes wrote, with respect to an Indiana property tax on the unitary business conducted by an express company:

> "It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege [of carrying on commerce among the States], or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense." *Fargo* v. *Hart*, 193 U. S. 490, 499–500.

In this case the "notion of organic unity" of Mobil's far-flung operations is applied solely for the purpose of making a fair determination of its Vermont earnings. Mobil does not dispute Vermont's right to treat its operations in Vermont as part of a unitary business and to measure the income attribut-

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state, and where received in connection with business outside the state, shall be allocated outside of the state.' Iowa Code § 422.33 (1)(*a*) (1977). "In describing this section, the Iowa Supreme Court stated that 'certain income, the geographical source of which is easily identifiable, is allocated to the appropriate state.' 254 N. W. 2d 737, 739. Thus, for example, rental income would be attributed to the State where the property was located. And in appellant's case, this section operated to exclude its investment income from the tax base." 437 U. S., at 269, n. 1. See also State Taxation 185.

able to Vermont on the basis of the three-factor formula that compares payroll, sales, and tangible properties in that State with the values of those factors in the whole of the unitary business. Mobil's position, simply stated, is that it is grossly unfair to assign any part of its investment income to Vermont on the basis of those factors. To evaluate that position, it is necessary to identify the unitary business that produces the income subject to taxation by Vermont.

## II

Mobil's operations in Vermont consist solely of wholesale and retail marketing of petroleum products. Those operations are a tiny part of a huge unitary business that might be defined in at least three different ways.

First, as Mobil contends, the business might be defined to include all of its operations, but to exclude the income derived from dividends paid by legally separate entities.[7]

Second, as the Supreme Court of Vermont seems to have done,[8] the unitary business might be defined to include not only all of Mobil's operations, but also the income received from all of its investments in other corporations, regardless

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[7] Under this definition, Mobil computes its Vermont tax base for 1970 at approximately $23 million. On the basis of Vermont's three-factor formula, it computes Vermont's share of its total operating income as .146%, and it attributes the remaining 99.854% of the total to other locations. Using those figures, Mobil stated its Vermont taxable income to be approximately $30,000, which, when multiplied by 6%, the applicable tax rate, produced a total tax liability for 1970 of $1,821.67.

It would seem that in defining the unitary business in this way, it would be open to Vermont to exclude the payroll and property connected with the management of Mobil's investment income from the denominator of the apportionment factor, which would effectively raise Vermont's share of Mobil's total operating income above the .146% figure. Thus, while I believe that the amount Vermont claims Mobil earned in the State is obviously excessive, it is also probably true that Mobil's Vermont earnings for 1970 are somewhat greater than the approximately $30,000 it computed.

[8] 136 Vt. 545, 546, 394 A. 2d 1147, 1148 (1978).

of whether those other corporations are engaged in the same kind of business as Mobil,[9] and regardless of whether Mobil has a controlling interest in those corporations.[10]

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[9] Vermont has treated Mobil's dividend income from the following corporations as part of the relevant unitary business:

Baltimore Gas & Electric
Bank of New York
Business Development Corporation of N. C.
Cincinnati Gas & Electric
Connecticut Gas & Power
Canner's Steam Company, Inc.
Continental Oil and Asphalt Company
Dallas Power & Light
Dayton Power & Light
Duke Power Company
Duquesne Light Company
Florida Power Corporation
General Royalties
Gulf States Utilities Company
Hartford Electric Light Company
Houston Lighting and Power Company
Illinois Power Company
Monongahela Power Company
Northern Indiana Public Service Company
Northern State Power Company
Pacific Gas and Electric Company
Pacific Lighting Corporation
Public Service Electric & Gas Company
Rochester Gas & Electric Company
San Diego Gas & Electric Company
Southern California Edison Company
Texas Electric Service Company
Texas Power & Light Company
Union Electric Company
United Illuminating Company
West Penn Power Company
Atlantic City Electric Company
Brooklyn Union Gas Company
Detroit Edison Company
Iowa-Illinois Gas & Electric Company

[*Footnote 10 is on p. 457*]

Third, Mobil's unitary business might be defined as encompassing not only the operations of the taxpayer itself but also the operations of all affiliates that are directly or indirectly engaged in the petroleum business. The Court seems to assume that this definition justifies Vermont's assessment in this case.

Mobil does not contend that it would be unfair for Vermont to apply its three-factor formula to the first definition of its unitary business. It has no quarrel with apportionment formulas generally, not even Vermont's. But by consistently arguing that its income from dividends should be entirely excluded from the apportionment calculation, Mobil has directly challenged any *application* of Vermont's formula based on either the second or the third definition of its unitary business. I shall briefly explain why the record is sufficient to support that challenge.

## III

Under the Supreme Court of Vermont's conception of the relevant unitary business—the second of the three alternative definitions just posited—there is no need to consider the character of the operations of the corporations that have paid dividends to Mobil. For Vermont automatically included all of the taxpaying entity's investment income in the tax base. Such an approach simply ignores the *raison d'être* for apportionment formulas.

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Indiana & Michigan Electric Company
Philadelphia Electric Company
Public Service Company of Colorado
New York Incorporated Corporation

See App. 77–78.

[10] Mobil has only small minority interests in the corporations listed in footnote 9. It also received dividends in 1970 of over $115 million from a 10% interest in the Arabian American Oil Company. By including Mobil's dividend income, some $174 million in 1970, in the apportionable tax base, and multiplying the apportionable tax base thus comprised by .146%, Vermont computed Mobil's 1970 tax liability to be $19,078.56.

We may assume that there are cases in which it would be appropriate to regard modest amounts of investment income as an incidental part of a company's overall operations and to allocate it between the taxing State and other jurisdictions on the basis of the same factors as are used to allocate operating income.[11] But this is not such a case. Mobil's investment income is far greater than its operating income.[12]

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[11] Because there is no necessary correlation between the levels of profitability of investment income and marketing income, if more than incidental amounts of investment income are used in an averaging formula intended to measure marketing income, inaccuracy is sure to result.

[12] For the year 1970, appellant had dividend income of approximately $174 million as compared with what it calculated to be apportionable income of approximately $23 million. This case is therefore comparable to the example given by Keesling and Warren in their article, The Unitary Concept in the Allocation of Income, 12 Hastings L. J. 42, 52–53 (1960):

"*Example* 1. A company with a commercial domicile in California, where its headquarters are located, is engaged in the operation of a system of railway lines throughout the western part of the United States. Over the years it has accumulated large reserves which are invested for the most part in stocks and bonds of other companies, from which it derives substantial income in the form of dividends and interest. The investment activities are carried on in the headquarters' office where the railroad operations are managed and controlled. Some individuals devote their entire time to the investment activities, whereas others, including a number of officers, devote part of their time to both the investment activities and the railroad operations.

"Although both activities are commonly owned and managed, and there is some common use of personnel and facilities, and although some practical difficulties may be experienced in segregating the expenses of the investment activities, clearly it would be wrong to consider that the company is engaged in only one business and that the entire income of the company should be apportioned within and without the state by means of a formula. Notwithstanding the common elements, there are two distinct series of income-producing activities. This conclusion follows from the fact that the income from dividends and interest can be identified as being derived from the stocks and bonds and the activities related thereto, and not in any way attributable to the general railroad operations carried on within and without the state. Since stocks and bonds and other intangibles are considered to have a location at the commercial domicile of the

Clearly, it is improper simply to lump huge quantities of investment income that have no special connection with the taxpayer's operations in the taxing State into the tax base and to apportion it on the basis of factors that are used to allocate operating income.[13] The Court does not reject this reasoning; rather, its opinion at least partly disclaims reliance on any such theory.[14]

The Court appears to rely squarely on the third alternative approach to defining a unitary business. It assumes that Vermont's inclusion of the dividends in Mobil's apportionable tax base is predicated on the notion that the dividends represent the income of what would be the operating divisions of the Mobil Oil Corporation if Mobil and its affiliates were a single, legally integrated enterprise, rather than a corporation with numerous interests in other, separate corporations that pay it dividends. *Ante*, at 440–441.[15] Theoretically, that sort

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owner, and since all of the investment activities take place in California, the investment income should be computed separately and assigned entirely to California.

"The income from the railroad operations can likewise be identified as being derived from a distinct series of transactions, which should be considered as constituting a business separate and distinct from the investment activities. Since the railroad operations are carried on partly within and partly without the state, it is a unitary business and hence the income from the railway business as a whole should first be computed and apportioned within and without California by means of an appropriate allocation formula." (Footnote omitted.)

[13] No one could seriously maintain that if a wealthy New York resident should open a gas station in Vermont, Vermont could use his dividends as a measure of the profitability of his gas station.

[14] See n. 2, *supra*.

[15] "Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp.* v. *Washington*, 377 U. S. 436, 441 (1964). Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives."

of definition is unquestionably acceptable.[16] But there are at least three objections to its use in this case.

First, notwithstanding the Court's characterization of the record, it is readily apparent that a large number of the corporations in which Mobil has small minority interests and from which it derived significant dividend income would seem neither to be engaged in the petroleum business nor to have any connection whatsoever with Mobil's marketing business in Vermont.[17] Second, the record does not disclose whether the earnings of the companies that pay dividends to Mobil are even approximately equal to the amount of the dividends.[18]

But of greatest importance, the record contains no information about the payrolls, sales or property values of any of those corporations, and Vermont has made no attempt to incorporate them into the apportionment formula computa-

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[16] "It seems clear, strictly as a logical proposition, that foreign source income is no different from any other income when it comes to determining, by formulary apportionment, the appropriate share of the income of a unitary business taxable by a particular state. This does not involve state taxation of foreign source income any more than does apportionment—in the case of a multistate business—involve the taxation of income arising in other states. In both situations the total income of the unitary business simply provides the starting point for computing the in-state income taxable by the particular state. . . .

"Obviously, if the foreign source income is included in the base for apportionment, foreign property, payrolls and sales must be included in the apportionment fractions. This was recognized in *Bass* [, *Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271]. . . ." State Taxation 205.

[17] See n. 9, *supra*.

[18] A corporation's decision as to how much of its earnings to pay out in dividends is subject to many variables. Nothing says that 100% must be passed through to the stockholders. A corporation is not a partnership. Indeed, depending on the state of the corporation's finances, dividends could conceivably even exceed 100% of the earnings. In any event, at least for those corporations in which it has only a minority interest, Mobil cannot control the percentage of their earnings that is paid out in dividends.

tions. Unless the sales, payroll, and property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will inevitably cause Mobil's Vermont income to be overstated.[19]

Either Mobil's worldwide "petroleum enterprise," *ante,* at 435, is all part of one unitary business, or it is not; if it is, Vermont must evaluate the entire enterprise in a consistent manner. As it is, it has indefensibly used its apportionment methodology artificially to multiply its share of Mobil's 1970 taxable income perhaps as much as tenfold.[20] In my judgment, the record is clearly sufficient to establish the validity of Mobil's objections to what Vermont has done here.

## IV

The Court does not confront these problems because it concludes that Mobil has in effect waived any objections with respect to them. Although the Court's effort to avoid constitutional issues by narrowly constricting its holding is commendable, I believe it has seriously erred in its assessment of the procedural posture of this case.

It is true that appellant has disclaimed any dispute with "Vermont's method of apportionment." Brief for Appellant 11. And, admittedly, appellant has confused its cause by variously characterizing its attack in its main brief and reply brief. But contrary to the Court's assertions, see nn. 1, 3, *supra,* appellant did not disclaim any dispute with the accuracy or fairness of the application of the formula in this case. Mobil merely disclaimed any attack on Vermont's

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[19] See n. 16, *supra.*

[20] The net result of the inclusion of the out-of-state investment income and the exclusion of the sales, payroll, and property factors that produce that investment income is to increase Mobil's tax liability to Vermont for 1970 from the $1,821.67 computed by Mobil to $19,078.56.

*method* of apportionment generally to contrast its claims in this case with the sort of challenge to Iowa's single-factor formula that was rejected in *Moorman*.

The question whether Vermont may include investment income in the apportionable tax base should not be answered in the abstract without consideration of the other factors in the allocation formula. The apportionable tax base is but one multiplicand in the formula. Appellant's challenge to the inclusion of investment income in that component necessarily carries with it a challenge to the product.

Because of the inherent interdependence of the issues in a case of this kind, it seems clear to me that Mobil has not waived its due process objections to Vermont's assessment. Appellant's disclaimer of a *Moorman* style attack cannot fairly be interpreted as a concession that makes its entire appeal a project without a purpose. On the contrary, its argument convincingly demonstrates that the inclusion of its dividend income in the apportionable tax base has produced a palpably arbitrary measure of its Vermont income.

In sum, if Vermont is to reject Mobil's calculation of its tax liability, two courses are open to it: (1) it may exclude Mobil's investment income from the apportionable tax base and also exclude the payroll and property used in managing the investments from the denominator of the apportionment factor; or (2) it may undertake the more difficult and risky task of trying to create a consolidated income statement of Mobil's entire unitary business, properly defined. The latter alternative is permissible only if the statement fairly summarizes consolidated earnings, and takes the payroll, sales, and property of the payor corporations into account. Because Vermont has employed neither of these alternatives, but has used a method that inevitably overstates Mobil's earnings in the State, I would reverse the judgment of the Supreme Court of Vermont.

# UNITED STATES v. CREWS

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 78-777. Argued October 31, 1979—Decided March 25, 1980

Immediately after being assaulted and robbed at gunpoint, the victim notified the police and gave them a full description of her assailant. Several days later, respondent, who matched the suspect's description, was seen by the police around the scene of the crime. After an attempt to photograph him proved unsuccessful, respondent was taken into custody, ostensibly as a suspected truant from school, and was detained at police headquarters, where he was briefly questioned, photographed, and then released. Thereafter, the victim identified respondent's photograph as that of her assailant. Respondent was again taken into custody and at a court-ordered lineup was identified by the victim. Respondent was then indicted for armed robbery and other offenses. On respondent's pretrial motion to suppress all identification testimony, the trial court found that respondent's initial detention at the police station constituted an arrest without probable cause and accordingly ruled that the products of that arrest—the photographic and lineup identifications—could not be introduced at trial, but further held that the victim's ability to identify respondent in court was based upon independent recollection untainted by the intervening identifications and that therefore such testimony was admissible. At trial, the victim once more identified respondent as her assailant, and respondent was convicted of armed robbery. The District of Columbia Court of Appeals reversed, holding that the in-court identification testimony should have been excluded as a product of the violation of respondent's Fourth Amendment rights.

*Held:* The judgment is reversed. Pp. 470–477; 477; 477–479.

389 A. 2d 277, reversed.

MR. JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II-A, II-B, and II-C, concluding that:

The in-court identification need not be suppressed as the fruit of respondent's concededly unlawful arrest but is admissible because the police's knowledge of respondent's identity and the victim's independent recollections of him both antedated the unlawful arrest and were thus untainted by the constitutional violation. Pp. 470–474, 477.

(a) The victim's presence in the courtroom at respondent's trial was not the product of any police misconduct. Her identity was known long before there was any official misconduct, and her presence in court was thus not traceable to any Fourth Amendment violation. Pp. 471–472.

(b) Nor did the illegal arrest infect the victim's ability to give accurate identification testimony. At trial, she merely retrieved her mnemonic representation of the assailant formed at the time of the crime, compared it to the figure of respondent in the courtroom, and positively identified him as the robber. Pp. 472–473.

(c) Insofar as respondent challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct. P. 474.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE STEVENS, concluded in Part II–D that the Court need not decide whether respondent's person should be considered evidence and therefore a possible "fruit" of police misconduct, since the Fourth Amendment violation in question yielded nothing of evidentiary value that the police did not already have. Respondent's unlawful arrest served merely to link together two extant ingredients in his identification. While the exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained, it does not reach backward to taint information that was in official hands prior to any illegality. *Davis* v. *Mississippi*, 394 U. S. 721, distinguished. Pp. 474–477.

BRENNAN, J., announced the Court's judgment and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and II–C, in which STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined, and an opinion with respect to Part II–D, in which STEWART and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part, in which BLACKMUN, J., joined, *post*, p. 477. WHITE, J., filed an opinion concurring in the result, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 477. MARSHALL, J., took no part in the consideration or decision of the case.

*Deputy Solicitor General Frey* argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann, Richard A. Allen,* and *Frank J. Marine.*

*W. Gary Kohlman* argued the cause for respondent. With him on the brief was *Silas J. Wasserstrom.**

MR. JUSTICE BRENNAN delivered the opinion of the Court, except as to Part II–D.

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest.

## I

On the morning of January 3, 1974, a woman was accosted and robbed at gunpoint by a young man in the women's restroom on the grounds of the Washington Monument. Her assailant, peering at her through a 4-inch crack between the wall and the door of the stall she occupied, asked for $10 and demanded that he be let into the stall. When the woman refused, the robber pointed a pistol over the top of the door and repeated his ultimatum. The victim then surrendered the money, but the youth demanded an additional $10. When the woman opened her purse and showed her assailant that she had no more cash, he gained entry to her stall and made sexual advances upon her. She tried to resist and pleaded with him to leave. He eventually did, warning his victim that he would shoot her if she did not wait at least 20 minutes before following him out of the restroom. The woman complied, and upon leaving the restroom 20 minutes later, immediately reported the incident to the police.

On January 6, two other women were assaulted and robbed in a similar episode in the same restroom. A young man threatened the women with a broken bottle, forced them to hand over $20, and then departed, again cautioning his victims not to leave for 20 minutes. The description of the

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**Frank G. Carrington, Jr., Wayne W. Schmidt, Fred E. Inbau,* and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., as *amicus curiae*.

robber given to the police by these women matched that given by the first victim: All three described their assailant as a young black male, 15–18 years old, approximately 5′5″ to 5′8″ tall, slender in build, with a very dark complexion and smooth skin.

Three days later, on January 9, Officer David Rayfield of the United States Park Police observed respondent in the area of the Washington Monument concession stand and restrooms. Aware of the robberies of the previous week and noting respondent's resemblance to the police "lookout" that described the perpetrator, the officer and his partner approached respondent.[1] Respondent gave the officers his name and said that he was 16 years old. When asked why he was not in school, respondent replied that he had just "walked away from school."[2] The officers informed respondent of his likeness to the suspect's description, but there was no further questioning about those events. Respondent was allowed to leave, and the officers watched as he entered the nearby restrooms.

While respondent was still inside, Officer Rayfield saw and spoke to James Dickens, a tour guide who had previously reported having seen a young man hanging around the area of the Monument on the day of the January 3d robbery. In response to the officer's request to observe respondent as he left the restroom, Dickens tentatively identified him as the individual he had seen on the day of the robbery.

On the basis of this additional information, the officers again approached respondent and detained him. Detective Earl Ore, the investigator assigned to the robberies, was immediately summoned. Upon his arrival some 10 or 15 minutes later, Detective Ore attempted to take a Polaroid photo-

[1] Officer Rayfield testified that his suspicions were further aroused both by respondent's presence on the almost deserted park grounds and by his apparently aimless meanderings around the restroom and concessions area.

[2] Tr. 52. References are to the transcript of the suppression hearing and trial held on April 22 and 23, 1974, in the Superior Court of the District of Columbia.

graph of respondent, but the inclement weather conditions frustrated his several efforts to produce a picture suitable for display to the robbery victims. Respondent was therefore taken into custody, ostensibly because he was a suspected truant. He was then transported to Park Police headquarters, where the police briefly questioned him, obtained the desired photograph, telephoned his school, and released him. Respondent was never formally arrested or charged with any offense, and his detention at the station lasted no more than an hour.

On the following day, January 10, the police showed the victim of the first robbery an array of eight photographs, including one of respondent. Although she had previously viewed over 100 pictures of possible suspects without identifying any of them as her assailant, she immediately selected respondent's photograph as that of the man who had robbed her. On January 13, one of the other victims made a similar identification.[3] Respondent was again taken into custody, and at a court-ordered lineup held on January 21, he was positively identified by the two women who had made the photographic identifications.

The grand jury returned an indictment against respondent on February 22, 1974, charging him with two counts of armed robbery, two counts of robbery, one count of attempted armed robbery, and three counts of assault with a dangerous weapon.[4] Respondent filed a pretrial motion to suppress all identification testimony, contending that his detention on the truancy charges had been merely a pretext to allow the police to obtain evidence for the robbery investigation. After hearing extensive testimony from the three victims, the police officers, and respondent, the trial court found that the respondent's detention at Park Police headquarters on January 9 consti-

[3] The third victim did not review the photographic array, nor did she attend the subsequent lineup.

[4] See D. C. Code §§ 22–502, 22–2901, and 22–3202 (1973).

tuted an arrest without probable cause.[5] Accordingly, the court ruled that the products of that arrest—the photographic and lineup identifications—could not be introduced at trial. But the judge concluded that the victims' ability to identify respondent in court was based upon independent recollection untainted by the intervening identifications, and therefore held such testimony admissible. At trial, all three victims identified respondent as their assailant. On April 23, the jury convicted him of armed robbery of the first victim, but returned verdicts of not guilty on all other charges.[6] Respondent was sentenced to four years' probation under the Federal Youth Corrections Act, 18 U. S. C. § 5010 (a).

On appeal, the District of Columbia Court of Appeals, sitting en banc, reversed respondent's conviction and ordered the suppression of the first robbery victim's in-court identi-

[5] The suppression hearing produced conflicting testimony as to the reasons for the attempt to photograph respondent. Officer Rayfield asserted that respondent was processed as a routine juvenile truant, a procedure that involves photographing the suspect and then calling his school and home to determine whether he is in fact truant. Tr. 53–54. Rayfield did acknowledge, however, that he had some suspicion that respondent was the robber described in the police description. *Id.*, at 55, 57. Similarly, Detective Ore, while maintaining that respondent was apprehended and taken down to Park Police headquarters as a suspected truant, *id.*, at 61, 63, admitted that his intent in trying to photograph him was to obtain a picture that could be shown to the complaining witnesses. *Id.*, at 59.

The Government does not now attempt to justify respondent's detention on the truancy charge, nor did it raise that argument in the court below. The Court of Appeals found that the procedures followed in respondent's case did not conform to the typical truancy practices described by the police and that the officers never even superficially pursued the truancy matter. By the same token, the court expressly disavowed the existence of a "sham" or "pretext" arrest, and it analyzed respondent's apprehension as a traditional arrest for armed robbery and assault without probable cause. 389 A. 2d 277, 299–300, n. 32 (DC 1978).

[6] Because respondent was acquitted of all charges in connection with the robberies of January 6, the only issue raised on his appeal was the admissibility of the first robbery victim's in-court identification.

fication.[7] 389 A. 2d 277 (1978). The court viewed its decision to be a wholly conventional application of the familiar "fruit of the poisonous tree" doctrine. See *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920). After upholding the trial court's finding that respondent was detained without probable cause—a determination that is not challenged in this Court[8]—the Court of Appeals turned to consideration of what evidentiary consequences ought to flow from that Fourth Amendment violation. In deciding whether the in-court identification should have been suppressed, the court observed that the analysis must focus on whether the evidence was obtained by official "exploitation" of the "primary illegality" within the meaning of *Wong Sun, supra*,[9] and that the principal issue was whether the unlawful police behavior bore a causal relationship to the acquisition of the challenged testimony. The court answered that question in the affirmative, reasoning that but for respondent's unlawful arrest, the police would not have obtained the photograph that led to his subsequent identification by the complaining witnesses and, ultimately, prosecution of the case.[10] Satisfied that the

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[7] On February 16, 1977, a division of the Court of Appeals originally affirmed respondent's conviction, 369 A. 2d 1063. Three months later, however, the full court granted respondent's motion for rehearing and vacated its earlier judgment. Record 356.

[8] See Brief for United States 5, n. 4.

[9] "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." *Wong Sun* v. *United States*, 371 U. S., at 487–488.

[10] "[T]he unlawful arrest produced photographs which were shown to the complaining witnesses who, as a result, identified [respondent]; this resulted in his reapprehension, which yielded a court-ordered lineup iden-

in-court identification was thus at least indirectly the product of official misconduct, the court then considered whether any of three commonly advanced exceptions to the exclusionary rule—the "independent source," "inevitable discovery," or "attentuation" doctrines [11]—nonetheless justified its admission. Finding these exceptions inapplicable, the Court of Appeals concluded that the in-court identification testimony should have been excluded as a product of the violation of respondent's Fourth Amendment rights. We granted certiorari. 440 U. S. 907 (1979). We reverse.

## II

*Wong Sun, supra,* articulated the guiding principle for determining whether evidence derivatively obtained from a violation of the Fourth Amendment is admissible against the accused at trial: "The exclusionary prohibition extends as well to the indirect as the direct products of such invasions." 371 U. S., at 484. See *Silverthorne Lumber Co.* v. *United States, supra; Weeks* v. *United States,* 232 U. S. 383 (1914). As subsequent cases have confirmed, the exclusionary sanction applies to any "fruits" of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search,[12] items observed or words overheard in the course of the unlawful activity,[13] or confessions or statements of the accused obtained during an illegal arrest and detention.[14]

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tification and, eventually, in-court identification testimony during prosecution of the case." 389 A. 2d, at 289.

[11] See *Nardone* v. *United States,* 308 U. S. 338, 341 (1939) (attenuation); *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392 (1920) (independent source); *United States ex rel. Owens* v. *Twomey,* 508 F. 2d 858, 865 (CA7 1974) (inevitable discovery).

[12] *E. g., Whiteley* v. *Warden,* 401 U. S. 560 (1971); *Sibron* v. *New York,* 392 U. S. 40 (1968); *Beck* v. *Ohio,* 379 U. S. 89 (1964).

[13] *E. g., United States* v. *Giordano,* 416 U. S. 505 (1974); see *Silverman* v. *United States,* 365 U. S. 505 (1961); *McGinnis* v. *United States,* 227 F. 2d 598 (CA1 1955).

[14] *E. g., Dunaway* v. *New York,* 442 U. S. 200 (1979); *Brown* v. *Illinois,* 422 U. S. 590 (1975).

In the typical "fruit of the poisonous tree" case, however, the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation, and the question before the court is whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality. Thus most cases begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity. It is the Court of Appeals' application of that premise to the facts of this case that we find erroneous.

A victim's in-court identification of the accused has three distinct elements. First, the victim is present at trial to testify as to what transpired between her and the offender, and to identify the defendant as the culprit. Second, the victim possesses knowledge of and the ability to reconstruct the prior criminal occurrence and to identify the defendant from her observations of him at the time of the crime. And third, the defendant is also physically present in the courtroom, so that the victim can observe him and compare his appearance to that of the offender. In the present case, it is our conclusion that none of these three elements "has been come at by exploitation" of the violation of the defendant's Fourth Amendment rights. *Wong Sun, supra,* at 488.

A

In this case, the robbery victim's presence in the courtroom at respondent's trial was surely not the product of any police misconduct. She had notified the authorities immediately after the attack and had given them a full description of her assailant. The very next day, she went to the police station to view photographs of possible suspects, and she voluntarily assisted the police in their investigation at all times. Thus this is not a case in which the witness' identity was discovered or her cooperation secured only as a result of an unlawful

search or arrest of the accused.[15] Here the victim's identity was known long before there was any official misconduct, and her presence in court is thus not traceable to any Fourth Amendment violation.

B

Nor did the illegal arrest infect the victim's ability to give accurate identification testimony. Based upon her observations at the time of the robbery, the victim constructed a mental image of her assailant. At trial, she retrieved this mnemonic representation, compared it to the figure of the defendant, and positively identified him as the robber.[16] No part of this process was affected by respondent's illegal arrest. In the language of the "time-worn metaphor" of the poisonous tree, *Harrison* v. *United States*, 392 U. S. 219, 222 (1968), the toxin in this case was injected only after the evidentiary bud had blossomed; the fruit served at trial was not poisoned.

This is not to say that the intervening photographic and lineup identifications—both of which are conceded to be suppressible fruits of the Fourth Amendment violation—could not under some circumstances affect the reliability of the in-court identification and render it inadmissible as well. Indeed, given the vagaries of human memory and the inherent suggestibility of many identification procedures,[17] just

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[15] See generally Ruffin, Out on a Limb of the Poisonous Tree: The Tainted Witness, 15 UCLA L. Rev. 32 (1967).

[16] At oral argument, the Government compared the witness' mental image to an undeveloped photograph of the robber that is given to the police immediately after the crime, but which becomes visible only at the trial. Tr. of Oral Arg. 11–12. Although this analogy may not comport precisely with current psychological theories of perception, see, *e. g.*, Buckout, Eyewitness Testimony, Scientific American 23 (Dec. 1974), it is apt for purposes of analysis.

[17] See, *e. g.*, P. Wall, Eye-Witness Identification in Criminal Cases 40–64 (1965); Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969, 974–989 (1977).

the opposite may be true. But in the present case the trial court expressly found that the witness' courtroom identification rested on an independent recollection of her initial encounter with the assailant, uninfluenced by the pretrial identifications, and this determination finds ample support in the record.[18] In short, the victim's capacity to identify her assailant in court neither resulted from nor was biased by the unlawful police conduct committed long after she had developed that capacity.[19]

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[18] *United States* v. *Wade*, 388 U. S. 218 (1967), enumerated several factors for consideration in applying the "independent origins" test. *Id.*, at 241. Cf. *Manson* v. *Brathwaite*, 432 U. S. 98 (1977); *Neil* v. *Biggers*, 409 U. S. 188 (1972). We attach particular significance to the following circumstances which support the trial court's determination in this case: the victim viewed her assailant at close range for a period of 5–10 minutes under excellent lighting conditions and with no distractions, Tr. 4, 7, 111; respondent closely matched the description given by the victim immediately after the robbery, *id.*, at 52, 59; the victim failed to identify anyone other than respondent, *id.*, at 8, but twice selected respondent without hesitation in nonsuggestive pretrial identification procedures, *id.*, at 9–11; and only a week had passed between the victim's initial observation of respondent and her first identification of him, *id.*, at 8–9.

Our reliance on the fact that the witness twice identified respondent in out-of-court confrontations is not intended to assign any independent evidentiary value to those identifications for to do so would undermine the exclusionary rule's objectives in denying the Government the benefit of any evidence wrongfully obtained. Rather, the accurate pretrial identifications assume significance only to the extent that they indicate that the witness' ability to identify respondent antedated any police misconduct, and hence that her in-court identification had an "independent source."

[19] Respondent contends that the "independent source" test of *United States* v. *Wade*, *supra*, and *Stovall* v. *Denno*, 388 U. S. 293 (1967), although derived from an identical formulation in *Wong Sun*, see 388 U. S., at 241, seeks only to determine whether the in-court identification is sufficiently reliable to satisfy due process, and is thus inapplicable in the context of this Fourth Amendment violation. We agree that a satisfactory resolution of the reliability issue does not provide a complete answer to the considerations underlying *Wong Sun*, but note only that in the present case both concerns are met.

C

Insofar as respondent challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. *Gerstein* v. *Pugh*, 420 U. S. 103, 119 (1975); *Frisbie* v. *Collins*, 342 U. S. 519 (1952); *Ker* v. *Illinois*, 119 U. S. 436 (1886).[20] The exclusionary principle of *Wong Sun* and *Silverthorne Lumber Co.* delimits what proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct.

D*

Respondent argues, however, that in one respect his corpus is itself a species of "evidence." When the victim singles out respondent and declares, "That's the man who robbed me," his physiognomy becomes something of evidentary value, much like a photograph showing respondent at the scene of the

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[20] Cf. *United States* v. *Blue*, 384 U. S. 251, 255 (1966):

"Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."

In some cases, of course, prosecution may effectively be foreclosed by the absence of the challenged evidence. But this contemplated consequence is the product of the exclusion of specific evidence tainted by the Fourth Amendment violation and is not the result of a complete bar to prosecution.

*This part is joined only by MR. JUSTICE STEWART and MR. JUSTICE STEVENS.

crime.[21] And, as with the introduction of such a photograph, he contends that the crucial inquiry for Fourth Amendment purposes is whether that evidence has become available only as a result of official misconduct. We read the Court of Appeals' opinion as essentially adopting this analysis to support its suppression order. See 389 A. 2d, at 285–287.

We need not decide whether respondent's person should be considered evidence, and therefore a possible "fruit" of police misconduct. For in this case the record plainly discloses that prior to his illegal arrest, the police both knew respondent's identity and had some basis to suspect his involvement in the very crimes with which he was charged. Moreover, before they approached respondent, the police had already obtained access to the "evidence" that implicated him in the robberies, *i. e.*, the mnemonic representations of the criminal retained by the victims and related to the police in the form of their agreement upon his description. In short, the Fourth Amendment violation in this case yielded nothing of evidentiary value that the police did not already have in their grasp.[22] Rather, respondent's unlawful arrest served merely to link together two extant ingredients in his identification. The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.

Accordingly, this case is very different from one like *Davis* v. *Mississippi*, 394 U. S. 721 (1969), in which the defendant's identity and connection to the illicit activity were only first discovered through an illegal arrest or search. In that case, the defendant's fingerprints were ordered suppressed as the

[21] Cf. *Stevenson* v. *Mathews*, 529 F. 2d 61, 63 (CA7 1976).

[22] Thus we are not called upon in this case to hypothesize about whether routine investigatory procedures would eventually have led the police to discover respondent's culpability. His involvement in the robberies was already suspected, and no new evidence was acquired through the violation of his Fourth Amendment rights.

fruits of an unlawful detention. A woman had been raped in her home, and during the next 10 days, the local police rounded up scores of black youths, randomly stopping, interrogating, and fingerprinting them. Davis' prints were discovered to match a set found at the scene of the crime, and on that basis he was arrested and convicted. Had it not been for Davis' illegal detention, however, his prints would not have been obtained and he would never have become a suspect. Here, in contrast, the robbery investigation had already focused on respondent, and the police had independent reasonable grounds to suspect his culpability.

We find *Bynum* v. *United States*, 104 U. S. App. D. C. 368, 262 F. 2d 465 (1958), cited with approval in *Davis*, *supra*, at 724, helpful in our analysis as well. In *Bynum*, the defendant voluntarily came down to the police station to look for his brother, who had been arrested earlier that day while driving an auto sought in connection with a robbery. After telling one of the officers that he owned the car, Bynum was arrested and fingerprinted. Those prints were later found to match a set at the scene of the robbery, and Bynum was convicted based in part on that evidence. The Court of Appeals held that the police lacked probable cause at the time of Bynum's arrest, and it ordered the prints suppressed as "something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention." 104 U. S. App. D. C., at 370, 262 F. 2d, at 467. As this Court noted in *Davis*, however, 394 U. S., at 725–726, n. 4, Bynum was subsequently reindicted for the same offense, and the Government on retrial introduced an older set of his fingerprints, taken from an FBI file, that were in no way connected with his unlawful arrest. The Court of Appeals affirmed that conviction, holding that the fingerprint identification made on the basis of information already in the FBI's possession was not tainted by the subsequent illegality and was therefore admissible. *Bynum* v. *United States*, 107 U. S. App. D. C. 109, 274 F. 2d 767 (1960).

The parallels between *Bynum* and this case are apparent: The pretrial identification obtained through use of the photograph taken during respondent's illegal detention cannot be introduced; but the in-court identification is admissible, even if respondent's argument be accepted, because the police's knowledge of respondent's identity and the victim's independent recollections of him both antedated the unlawful arrest and were thus untainted by the constitutional violation. The judgment of the Court of Appeals is accordingly

*Reversed.*

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring in part.

I join the Court's opinion except for Part II–D. I would reject explicitly, rather than appear to leave open, the claim that a defendant's face can be a suppressible fruit of an illegal arrest. I agree with MR. JUSTICE WHITE's view, *post*, at 477–478, that this claim is foreclosed by the rationale of *Frisbie* v. *Collins*, 342 U. S. 519 (1952), and *Ker* v. *Illinois*, 119 U. S. 436 (1886). Those cases establish that a defendant properly may be brought into court for trial even though he was arrested illegally. Thus, the only evidence at issue in this case is the robbery victims' identification testimony. I agree with the Court that the victims' testimony is not tainted.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the result.

The Court today holds that an in-court identification of the accused by the victim of a crime should not be suppressed as the fruit of the defendant's unlawful arrest. Although we are unanimous in reaching this result, MR. JUSTICE BRENNAN's opinion reserves the question whether a defendant's face can ever be considered evidence suppressible as the "fruit" of an

illegal arrest. Because I consider this question to be controlled by the rationale of *Frisbie* v. *Collins*, 342 U. S. 519 (1952), I write separately.

Respondent Crews was convicted after an in-court identification by the victim whose own presence at trial, recollection, and identification the Court holds were untainted by prior illegal conduct by the police. Under these circumstances the manner in which the defendant's presence at trial was obtained is irrelevant to the admissibility of the in-court identification. We held in *Frisbie* v. *Collins*, *supra*, at 522, "that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction" unlawfully. A holding that a defendant's face can be considered evidence suppressible for no reason other than that the defendant's presence in the courtroom is the fruit of an illegal arrest would be tantamount to holding that an illegal arrest effectively insulates one from conviction for any crime where an in-court identification is essential. Such a holding would be inconsistent with the underlying rationale of *Frisbie* from which we have not retreated. *Stone* v. *Powell*, 428 U. S. 465, 485 (1976); *Gerstein* v. *Pugh*, 420 U. S. 103, 119 (1975).

Although the presence of Crews in the courtroom would not have occurred but for his arrest without probable cause, the in-court identification is held admissible. As I understand Part II–D of MR. JUSTICE BRENNAN's opinion, however, the in-court identification might have been inadmissible had there not been some reason to suspect Crews of the offense at the time of his illegal arrest. Such a rule excluding an otherwise untainted, in-court identification is wholly unsupported by our previous decisions. Nor do I perceive a constitutional basis for dispensing with probable cause but requiring reasonable suspicion.

Assume that a person is arrested for crime X and that answers to questions put to him without *Miranda* warnings implicate him in crime Y for which he is later tried. The

victim of crime Y identifies him in the courtroom; the identification has an independent, untainted basis. I would not suppress such an identification on the grounds that the police had no reason to suspect the defendant of crime Y prior to their illegal questioning and that it is only because of that questioning that he is present in the courtroom for trial. I would reach the same result whether or not his arrest for crime X was without probable cause or reasonable suspicion.

I agree that this case is very different from *Davis* v. *Mississippi*, 394 U. S. 721 (1969), but not for the reason given in my Brother BRENNAN's opinion. In *Davis* we held that fingerprints obtained from a defendant during an illegal detention had to be suppressed because they were the direct product of the unlawful arrest. Here, however, the evidence ordered suppressed was eyewitness testimony of the victim which was not the product of respondent's arrest. The fact that respondent was present at trial and therefore capable of being identified by the victim is merely the inevitable result of the trial being held, which is permissible under *Frisbie*, despite respondent's unlawful arrest. Suppression would be required in the *Davis* situation, but not here, regardless of whether the respective arrests were made without any reasonable suspicion or with something just short of probable cause.

Because MR. JUSTICE BRENNAN leaves open the question whether a defendant's face can be considered a suppressible fruit of an illegal arrest, a question I think has already been sufficiently answered in *Frisbie*, I cannot join his opinion, although I concur in the result.* I note that a majority of the Court agrees that the rationale of *Frisbie* forecloses the claim that respondent's face can be suppressible as a fruit of the unlawful arrest.

*For the same reason I cannot join the analysis at the beginning of Part II of the Court's opinion because it implies that a courtroom identification would be inadmissible if the defendant's physical presence had resulted from exploitation of a violation of the defendant's Fourth Amendment rights.

# VITEK, CORRECTIONAL DIRECTOR, ET AL. *v.* JONES

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 78–1155. Argued December 3, 1979—Decided March 25, 1980

Appellee, a convicted felon, was transferred from state prison to a mental hospital pursuant to a Nebraska statute (§ 83–180 (1)) which provides that if a designated physician or psychologist finds that a prisoner "suffers from a mental disease or defect" that "cannot be given proper treatment" in prison, the Director of Correctional Services may transfer the prisoner to a mental hospital. In an action challenging the constitutionality of § 83–180 (1) on procedural due process grounds, the District Court declared the statute unconstitutional as applied to appellee, holding that transferring him to the mental hospital without adequate notice and opportunity for a hearing deprived him of liberty without due process of law contrary to the Fourteenth Amendment, and that such transfers must be accompanied by adequate notice, an adversary hearing before an independent decisionmaker, a written statement by the factfinder of the evidence relied on and the reasons for the decision, and the availability of appointed counsel for indigent prisoners. The court permanently enjoined the State from transferring appellee (who meanwhile had been transferred back to prison) to the mental hospital without following the prescribed procedures. Subsequently, appellee was paroled on condition that he accept mental treatment, but he violated that parole and was returned to prison. Relying on appellee's history of mental illness and the State's representation that he was a serious threat to his own and others' safety, the District Court held that the parole and revocation thereof did not render the case moot because appellee was still subject to being transferred to the mental hospital.

*Held:* The judgment is affirmed as modified. Pp. 486–497; 497–500.

Affirmed as modified.

MR. JUSTICE WHITE delivered the opinion of the Court with respect to Parts I, II, III, IV–A, and V, concluding that:

1. The District Court properly found that the case is not moot. The reality of the controversy between appellee and the State has not been lessened by the cancellation of his parole and his return to prison, where he is protected from further transfer by the District Court's judgment

and injunction. Under these circumstances, it is not "absolutely clear," absent the injunction, that the State's alleged wrongful behavior could not reasonably be expected to recur. Pp. 486–487.

2. The involuntary transfer of appellee to a mental hospital implicates a liberty interest that is protected by the Due Process Clause of the Fourteenth Amendment. Pp. 487–494.

(a) The District Court properly identified a liberty interest rooted in § 83–180 (1), under which a prisoner could reasonably expect that he would not be transferred to a mental hospital without a finding that he was suffering from a mental illness for which he could not secure adequate treatment in prison. The State's reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting transfer exist neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution. Pp. 488–491.

(b) The District Court was also correct in holding that, independently of § 83–180 (1), the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections. Involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. While a conviction and sentence extinguish an individual's right to freedom from confinement for the term of his sentence, they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections. Here, the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections. Pp. 491–494.

3. The District Court properly identified and weighed the relevant factors in arriving at its judgment. Pp. 495–496.

(a) Although the State's interest in segregating and treating mentally ill patients is strong, the prisoner's interest in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, and the risk of error in making the determinations required by § 83–180 (1) is substantial enough to warrant appropriate procedural safeguards against error. P. 495.

(b) The medical nature of the inquiry as to whether or not to transfer a prisoner to a mental hospital does not justify dispensing with due process requirements. P. 495.

(c) Because prisoners facing involuntary transfer to a mental hospital are threatened with immediate deprivation of liberty interests and because of the risk of mistaken transfer, the District Court properly determined that certain procedural protections, including notice and an adversary hearing, were appropriate in the circumstances present in this case. Pp. 495–496.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS, concluded in Part IV–B that it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill. Such a prisoner has an even greater need for legal assistance than does a prisoner who is illiterate and uneducated, because he is more likely to be unable to understand or exercise his rights. Pp. 496–497.

MR. JUSTICE POWELL concluded that although the State is free to appoint a licensed attorney to represent a prisoner who is threatened with involuntary transfer to a mental hospital, it is not constitutionally required to do so, and that due process will be satisfied so long as such a prisoner is provided qualified and independent assistance. Pp. 497–500.

WHITE, J., announced the Court's judgment and delivered the opinion of the Court with respect to Parts I, II, III, IV–A, and V, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined, and an opinion with respect to Part IV–B , in which BRENNAN, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part, *post*, p. 497. STEWART, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 500. BLACKMUN, J., filed a dissenting opinion, *post*, p. 501.

*Melvin Kent Kammerlohr*, Assistant Attorney General of Nebraska, argued the cause for appellants. With him on the brief was *Paul L. Douglas*, Attorney General.

*Thomas A. Wurtz*, by appointment of the Court, 441 U. S. 960, argued the cause and filed a brief for appellee.

MR. JUSTICE WHITE delivered the opinion of the Court, except as to Part IV–B.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment entitles a prisoner convicted and incarcerated in the State of Nebraska to certain proce-

dural protections, including notice, an adversary hearing, and provision of counsel, before he is transferred involuntarily to a state mental hospital for treatment of a mental disease or defect.

## I

Nebraska Rev. Stat. § 83–176 (2) (1976) authorizes the Director of Correctional Services to designate any available, suitable, and appropriate residence facility or institution as a place of confinement for any state prisoner and to transfer a prisoner from one place of confinement to another. Section 83–180 (1), however, provides that when a designated physician or psychologist finds that a prisoner "suffers from a mental disease or defect" and "cannot be given proper treatment in that facility," the director may transfer him for examination, study, and treatment to another institution within or without the Department of Correctional Services.[1] Any prisoner so transferred to a mental hospital is to be returned to the Department if, prior to the expiration of his sentence, treatment is no longer necessary. Upon expiration of sen-

[1] Section 83–180 (1) provides:

"When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary."

tence, if the State desires to retain the prisoner in a mental hospital, civil commitment proceedings must be promptly commenced. § 83–180 (3).[2]

On May 31, 1974, Jones was convicted of robbery and sentenced to a term of three to nine years in state prison. He was transferred to the penitentiary hospital in January 1975. Two days later he was placed in solitary confinement, where he set his mattress on fire, burning himself severely. He was treated in the burn unit of a private hospital. Upon his release and based on findings required by § 83–180 that he was suffering from a mental illness or defect and could not receive proper treatment in the penal complex, he was transferred to the security unit of the Lincoln Regional Center, a state mental hospital under the jurisdiction of the Department of Public Institutions.

Jones then intervened in this case, which was brought by other prisoners against the appropriate state officials (the State) challenging on procedural due process grounds the adequacy of the procedures by which the Nebraska statutes permit transfers from the prison complex to a mental hospital.[3] On August 17, 1976, a three-judge District Court, convened

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[2] Section 83–180 (3) provides:

"When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect."

[3] After initially certifying this case as a class action, the District Court decertified the class, but permitted intervention by three individual plaintiffs, including Jones. The District Court subsequently dismissed the claims of all plaintiffs except Jones, who is the sole appellee in this Court.

pursuant to 28 U. S. C. § 2281 (1970 ed.),[4] denied the State's motion for summary judgment and trial ensued. On September 12, 1977, the District Court declared § 83–180 unconstitutional as applied to Jones, holding that transferring Jones to a mental hospital without adequate notice and opportunity for a hearing deprived him of liberty without due process of law contrary to the Fourteenth Amendment and that such transfers must be accompanied by adequate notice, an adversary hearing before an independent decisionmaker, a written statement by the factfinder of the evidence relied on and the reasons for the decision, and the availability of appointed counsel for indigent prisoners. *Miller* v. *Vitek*, 437 F. Supp. 569 (Neb. 1977). Counsel was requested to suggest appropriate relief.

In response to this request, Jones revealed that on May 27, 1977, prior to the District Court's decision, he had been transferred from Lincoln Regional Center to the psychiatric ward of the penal complex but prayed for an injunction against further transfer to Lincoln Regional Center. The State conceded that an injunction should enter if the District Court was firm in its belief that the section was unconstitutional. The District Court then entered its judgment declaring § 83–180 unconstitutional as applied to Jones and permanently enjoining the State from transferring Jones to Lincoln Regional Center without following the procedures prescribed in its judgment.

We noted probable jurisdiction 434 U. S. 1060 (1978). Meanwhile, Jones had been paroled, but only on condition that he accept psychiatric treatment at a Veterans' Administration Hospital. We vacated the judgment of the District Court and remanded the case to that court for consideration

[4] The statute authorizing the convening of a three-judge court, 28 U. S. C. § 2281 (1970 ed.), was repealed by Pub. L. 94–381, 90 Stat. 1119, effective for actions commenced after August 12, 1976. Because the instant action was filed on November 12, 1975, the three-judge court was properly convened.

of the question of mootness. *Vitek* v. *Jones*, 436 U. S. 407 (1978). Both the State and Jones at this juncture insisted that the case was not moot. The State represented that because "Jones' history of mental illness indicates a serious threat to his own safety, as well as to that of others . . . there is a very real expectation" that he would again be transferred if the injunction was removed. App. to Juris. Statement 24. Jones insisted that he was receiving treatment for mental illness against his will and that he was continuing to suffer from the stigmatizing consequences of the previous determination that he was mentally ill. On these representations, the District Court found that the case was not moot because Jones "is subject to and is in fact under threat of being transferred to the state mental hospital under § 83–180." *Ibid.* The District Court reinstated its original judgment. We postponed consideration of jurisdiction to a hearing on the merits. 441 U. S. 922 (1979). Meanwhile, Jones had violated his parole, his parole had been revoked, and he had been reincarcerated in the penal complex.

## II

We agree with the parties in this case that a live controversy exists and that the case is not moot. Jones was declared to be mentally ill pursuant to § 83–180 and was transferred to a mental hospital and treated. He was later paroled but only on condition that he accept mental treatment. He violated that parole and has been returned to the penal complex. On our remand to consider mootness, the District Court, relying on Jones' history of mental illness and the State's representation that he represented a serious threat to his own safety as well as to that of others, found that Jones "is in fact under threat of being transferred to the state mental hospital under § 83–180." We see no reason to disagree with the District Court's assessment at that time, and the reality of the controversy between Jones and the State has not been lessened by the cancellation of his parole and his return to the state prison,

where he is protected from further transfer by the outstanding judgment and injunction of the District Court. The State, believing that the case is not moot, wants the injunction removed by the reversal of the District Court's judgment. Jones, on the other hand, insists that the judgment of the District Court be sustained and the protection against transfer to a mental hospital, except in accordance with the specified procedures, be retained.

Against this background, it is not "absolutely clear," absent the injunction, "that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).[5] Furthermore, as the matter now stands, the § 83-180 determination that Jones suffered from mental illness has been declared infirm by the District Court. Vacating the District Court's judgment as moot would not only vacate the injunction against transfer but also the declaration that the procedures employed by the State afforded an inadequate basis for declaring Jones to be mentally ill. In the posture of the case, it is not moot.

## III

On the merits, the threshold question in this case is whether the involuntary transfer of a Nebraska state prisoner to a mental hospital implicates a liberty interest that is protected by the Due Process Clause. The District Court held that it did and offered two related reasons for its conclusion. The District Court first identified a liberty interest rooted in

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[5] Because Jones has not completed serving his sentence, he remains subject to the transfer procedures he challenges, unlike the plaintiff in *Weinstein* v. *Bradford*, 423 U. S. 147 (1975), where a challenge to parole procedures was held to be moot because plaintiff had completed his sentence and there was no longer any likelihood whatsoever that he would again be subjected to the parole procedures he challenged.

§ 83–180 (1), under which a prisoner could reasonably expect that he would not be transferred to a mental hospital without a finding that he was suffering from a mental illness for which he could not secure adequate treatment in the correctional facility. Second, the District Court was convinced that characterizing Jones as a mentally ill patient and transferring him to the Lincoln Regional Center had "some stigmatizing" consequences which, together with the mandatory behavior modification treatment to which Jones would be subject at the Lincoln Center, constituted a major change in the conditions of confinement amounting to a "grievous loss" that should not be imposed without the opportunity for notice and an adequate hearing. We agree with the District Court in both respects.

A

We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment. There is no "constitutional or inherent right" to parole, *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 7 (1979), but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revoke parole. *Morrissey* v. *Brewer*, 408 U. S. 471 (1972). The same is true of the revocation of probation. *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973). In *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), we held that a state-created right to good-time credits, which could be forfeited only for serious misbehavior, constituted a liberty interest protected by the Due Process Clause. We also noted that the same reasoning could justify extension of due process protections to a decision to impose "solitary" confinement because "[it] represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct." *Id.*, at 571–572, n. 19. Once a State has

granted prisoners a liberty interest, we held that due process protections are necessary "to insure that the state-created right is not arbitrarily abrogated." *Id.*, at 557.

In *Meachum* v. *Fano*, 427 U. S. 215 (1976), and *Montanye* v. *Haymes*, 427 U. S. 236 (1976), we held that the transfer of a prisoner from one prison to another does not infringe a protected liberty interest. But in those cases transfers were discretionary with the prison authorities, and in neither case did the prisoner possess any right or justifiable expectation that he would not be transferred except for misbehavior or upon the occurrence of other specified events. Hence, "the predicate for invoking the protection of the Fourteenth Amendment as construed and applied in *Wolff* v. *McDonnell* [was] totally nonexistent." *Meachum* v. *Fano*, *supra*, at 226–227.

Following *Meachum* v. *Fano* and *Montanye* v. *Haymes*, we continued to recognize that state statutes may grant prisoners liberty interests that invoke due process protections when prisoners are transferred to solitary confinement for disciplinary or administrative reasons. *Enomoto* v. *Wright*, 434 U. S. 1052 (1978), summarily aff'g 462 F. Supp. 397 (ND Cal. 1976). Similarly, in *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, we held that state law granted petitioners a sufficient expectancy of parole to entitle them to some measure of constitutional protection with respect to parole decisions.

We think the District Court properly understood and applied these decisions. Section 83–180 (1) provides that if a designated physician finds that a prisoner "suffers from a mental disease or defect" that "cannot be given proper treatment" in prison, the Director of Correctional Services may transfer a prisoner to a mental hospital. The District Court also found that in practice prisoners are transferred to a mental hospital only if it is determined that they suffer from a mental disease or defect that cannot adequately be treated within the penal complex. This "objective expectation, firmly fixed in state law and official Penal Complex practice," that

a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison, gave Jones a liberty interest that entitled him to the benefits of appropriate procedures in connection with determining the conditions that warranted his transfer to a mental hospital. Under our cases, this conclusion of the District Court is unexceptionable.

Appellants maintain that any state-created liberty interest that Jones had was completely satisfied once a physician or psychologist designated by the director made the findings required by § 83–180 (1) and that Jones was not entitled to any procedural protections.[6] But if the State grants a pris-

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[6] A majority of the Justices rejected an identical position in *Arnett* v. *Kennedy*, 416 U. S. 134, 166–167 (1974) (opinion of POWELL, J., joined by BLACKMUN, J.), 177–178 (opinion of WHITE, J.), 210–211 (opinion of MARSHALL, J., joined by Douglas and BRENNAN, JJ.). As MR. JUSTICE POWELL's opinion observed:

"The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in [*Board of Regents* v.] *Roth*[, 408 U. S. 564 (1972)] and [*Perry* v.] *Sindermann*[, 408 U. S. 593 (1972)]. Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statu-

oner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, "the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." *Wolff* v. *McDonnell*, 418 U. S., at 558. These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action. In *Morrissey*, *Gagnon*, and *Wolff*, the States had adopted their own procedures for determining whether conditions warranting revocation of parole, probation, or good-time credits had occurred; yet we held that those procedures were constitutionally inadequate. In like manner, Nebraska's reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting a transfer exist neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution.

B

The District Court was also correct in holding that independently of § 83–180 (1), the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections. The issue is whether after a conviction for robbery, Jones retained a residuum of liberty that would be infringed by a transfer to a mental hospital without complying with minimum requirements of due process.

We have recognized that for the ordinary citizen, commitment to a mental hospital produces "a massive curtailment of liberty," *Humphrey* v. *Cady*, 405 U. S. 504, 509 (1972), and in

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torily created property interest must be analyzed in constitutional terms. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Bell* v. *Burson*, 402 U. S. 535 (1971); *Board of Regents* v. *Roth*, *supra*; *Perry* v. *Sindermann*, *supra*." *Id.*, at 166–167.

consequence "requires due process protection." *Addington* v. *Texas*, 441 U. S. 418, 425 (1979); *O'Connor* v. *Donaldson*, 422 U. S. 563, 580 (1975) (BURGER, C. J., concurring). The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital "can engender adverse social consequences to the individual" and that "[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual." *Addington* v. *Texas*, *supra*, at 425–426. See also *Parham* v. *J. R.*, 442 U. S. 584, 600 (1979). Also, "[a]mong the historic liberties" protected by the Due Process Clause is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham* v. *Wright*, 430 U. S. 651, 673 (1977). Compelled treatment in the form of mandatory behavior modification programs, to which the District Court found Jones was exposed in this case, was a proper factor to be weighed by the District Court. Cf. *Addington* v. *Texas*, *supra*, at 427.

The District Court, in its findings, was sensitive to these concerns:

> "[T]he fact of greater limitations on freedom of action at the Lincoln Regional Center, the fact that a transfer to the Lincoln Regional Center has some stigmatizing consequences, and the fact that additional mandatory behavior modification systems are used at the Lincoln Regional Center combine to make the transfer a 'major change in the conditions of confinement' amounting to a 'grievous loss' to the inmate." *Miller* v. *Vitek*, 437 F. Supp., at 573.

Were an ordinary citizen to be subjected involuntarily to these consequences, it is undeniable that protected liberty interests would be unconstitutionally infringed absent compliance with the procedures required by the Due Process Clause.

We conclude that a convicted felon also is entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital.

Undoubtedly, a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S., at 7. Such a conviction and sentence sufficiently extinguish a defendant's liberty "to empower the State to confine him in any of its prisons." *Meachum* v. *Fano*, 427 U. S., at 224 (emphasis deleted). It is also true that changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him." *Montanye* v. *Haymes*, 427 U. S., at 242.

Appellants maintain that the transfer of a prisoner to a mental hospital is within the range of confinement justified by imposition of a prison sentence, at least after certification by a qualified person that a prisoner suffers from a mental disease or defect. We cannot agree. None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. *Baxstrom* v. *Herold*, 383 U. S. 107 (1966); *Specht* v. *Patterson*, 386 U. S. 605 (1967); *Humphrey* v. *Cady*, 405 U. S. 504 (1972); *Jackson* v. *Indiana*, 406 U. S. 715, 724–725 (1972). A criminal conviction and sentence of imprisonment extinguish an individ-

ual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.

In light of the findings made by the District Court, Jones' involuntary transfer to the Lincoln Regional Center pursuant to § 83–180, for the purpose of psychiatric treatment, implicated a liberty interest protected by the Due Process Clause. Many of the restrictions on the prisoner's freedom of action at the Lincoln Regional Center by themselves might not constitute the deprivation of a liberty interest retained by a prisoner, see *Wolff* v. *McDonnell*, 418 U. S., at 572, n. 19; cf. *Baxter* v. *Palmigiano*, 425 U. S. 308, 323 (1976). But here, the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections.

## IV

The District Court held that to afford sufficient protection to the liberty interest it had identified, the State was required to observe the following minimum procedures before transferring a prisoner to a mental hospital:

> "A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
>
> "B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
>
> "C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except

upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

"D. An independent decisionmaker;

"E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

"F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

"G. Effective and timely notice of all the foregoing rights." 437 F. Supp., at 575.

A

We think the District Court properly identified and weighed the relevant factors in arriving at its judgment. Concededly the interest of the State in segregating and treating mentally ill patients is strong. The interest of the prisoner in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, however; and as the District Court found, the risk of error in making the determinations required by § 83–180 is substantial enough to warrant appropriate procedural safeguards against error.

We recognize that the inquiry involved in determining whether or not to transfer an inmate to a mental hospital for treatment involves a question that is essentially medical. The question whether an individual is mentally ill and cannot be treated in prison "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington* v. *Texas*, 441 U. S., at 429. The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely "[t]he subtleties and nuances of psychiatric diagnoses" that justify the requirement of adversary hearings. *Id.*, at 430.

Because prisoners facing involuntary transfer to a mental hospital are threatened with immediate deprivation of liberty

interests they are currently enjoying and because of the inherent risk of a mistaken transfer, the District Court properly determined that procedures similar to those required by the Court in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), were appropriate in the circumstances present here.

The notice requirement imposed by the District Court no more than recognizes that notice is essential to afford the prisoner an opportunity to challenge the contemplated action and to understand the nature of what is happening to him. *Wolff* v. *McDonnell*, *supra*, at 564. Furthermore, in view of the nature of the determinations that must accompany the transfer to a mental hospital, we think each of the elements of the hearing specified by the District Court was appropriate. The interests of the State in avoiding disruption was recognized by limiting in appropriate circumstances the prisoner's right to call witnesses, to confront and cross examine. The District Court also avoided unnecessary intrusion into either medical or correctional judgments by providing that the independent decisionmaker conducting the transfer hearing need not come from outside the prison or hospital administration. 437 F. Supp., at 574.

**B***

The District Court did go beyond the requirements imposed by prior cases by holding that counsel must be made available to inmates facing transfer hearings if they are financially unable to furnish their own. We have not required the automatic appointment of counsel for indigent prisoners facing other deprivations of liberty, *Gagnon* v. *Scarpelli*, 411 U. S., at 790; *Wolff* v. *McDonnell*, *supra*, at 569–570; but we have recognized that prisoners who are illiterate and uneducated have a greater need for assistance in exercising their rights. *Gagnon* v. *Scarpelli*, *supra*, at 786–787; *Wolff* v. *McDonnell*, *supra*, at 570. A prisoner thought to be suffering from a

*This part is joined only by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS.

mental disease or defect requiring involuntary treatment probably has an even greater need for legal assistance, for such a prisoner is more likely to be unable to understand or exercise his rights. In these circumstances, it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill.

V

Because MR. JUSTICE POWELL, while believing that Jones was entitled to competent help at the hearing, would not require the State to furnish a licensed attorney to aid him, the judgment below is affirmed as modified to conform with the separate opinion filed by MR. JUSTICE POWELL.

*So ordered.*

MR. JUSTICE POWELL, concurring in part.

I join the opinion of the Court except for Part IV–B. I agree with Part IV–B insofar as the Court holds that qualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer to a state mental hospital. I do not agree, however, that the requirement of independent assistance demands that a licensed attorney be provided.[1]

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[1] I also agree with the Court's holding that this case is not moot. The question is whether appellee faces a substantial threat that he will again be transferred to a state mental hospital. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 930–932 (1975); *Steffel* v. *Thompson*, 415 U. S. 452, 458–460 (1974); *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973). He was involuntarily transferred from the prison complex to a mental institution, and thereafter paroled upon condition that he continue to receive psychiatric treatment. When he violated parole, he was returned to prison. The State advises us that appellee's "history of mental illness indicates a serious threat to his own safety, as well as to that of others," and "there is a very real expectation" of transfer if the District Court injunction were removed. App. to Juris. Statement 24. The District Court concluded that appellee is under threat of transfer. In these circumstances it is clear that a live controversy remains in which appellee has a personal stake. See *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 581–583 (1980).

I

In *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), my opinion for the Court held that counsel is not necessarily required at a probation revocation hearing. In reaching this decision the Court recognized both the effects of providing counsel to each probationer and the likely benefits to be derived from the assistance of counsel. "The introduction of counsel into a revocation proceeding [would] alter significantly the nature of the proceeding," *id.*, at 787, because the hearing would inevitably become more adversary. We noted that probationers would not always need counsel because in most hearings the essential facts are undisputed. In lieu of a *per se* rule we held that the necessity of providing counsel should be determined on a case-by-case basis. In particular, we stressed that factors governing the decision to provide counsel include (i) the existence of factual disputes or issues which are "complex or otherwise difficult to develop or present," and (ii) "whether the probationer appears to be capable of speaking effectively for himself." *Id.*, at 790, 791.

Consideration of these factors, and particularly the capability of the inmate, persuades me that the Court is correct that independent assistance must be provided to an inmate before he may be transferred involuntarily to a mental hospital. The essence of the issue in an involuntary commitment proceeding will be the mental health of the inmate. The resolution of factual disputes will be less important than the ability to understand and analyze expert psychiatric testimony that is often expressed in language relatively incomprehensible to laymen. It is unlikely that an inmate threatened with involuntary transfer to mental hospitals will possess the competence or training to protect adequately his own interest in these state-initiated proceedings. And the circumstances of being imprisoned without normal access to others who may assist him places an additional handicap upon an inmate's ability to represent himself. I therefore agree

that due process requires the provision of assistance to an inmate threatened with involuntary transfer to a mental hospital.

## II

I do not believe, however, that an inmate must always be supplied with a licensed attorney. "[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). See *Mathews* v. *Eldridge*, 424 U. S. 319, 334–335 (1976). Our decisions defining the necessary qualifications for an impartial decisionmaker demonstrate that the requirements of due process turn on the nature of the determination which must be made. "Due Process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *Parham* v. *J. R.*, 442 U. S. 584, 607 (1979). In that case, we held that due process is satisfied when a staff physician determines whether a child may be voluntarily committed to a state mental institution by his parents. That holding was based upon recognition that the issues of civil commitment "are essentially medical in nature," and that " 'neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments.' " *Id.*, at 607, 609, quoting *In re Roger S.*, 19 Cal. 3d 921, 942, 569 P. 2d 1286, 1299 (1977) (Clark, J., dissenting). See also *Morrissey* v. *Brewer*, *supra*, at 489; *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970).

In my view, the principle that due process does not always require a law-trained decisionmaker supports the ancillary conclusion that due process may be satisfied by the provision of a qualified and independent adviser who is not a lawyer. As in *Parham* v. *J. R.*, the issue here is essentially medical. Under state law, a prisoner may be transferred only if he "suffers from a mental disease or defect" and "cannot be given proper treatment" in the prison complex. Neb. Rev.

Stat. § 83–180 (1) (1976). The opinion of the Court allows a nonlawyer to act as the impartial decisionmaker in the transfer proceeding. *Ante*, at 496.[2]

The essence of procedural due process is a fair hearing. I do not think that the fairness of an informal hearing designed to determine a medical issue requires participation by lawyers. Due process merely requires that the State provide an inmate with qualified and independent assistance. Such assistance may be provided by a licensed psychiatrist or other mental health professional. Indeed, in view of the nature of the issue involved in the transfer hearing, a person possessing such professional qualifications normally would be preferred. As the Court notes, "[t]he question whether an individual is mentally ill and cannot be treated in prison 'turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.'" *Ante*, at 495, quoting *Addington* v. *Texas*, 441 U. S. 418, 429 (1979). I would not exclude, however, the possibility that the required assistance may be rendered by competent laymen in some cases. The essential requirements are that the person provided by the State be competent and independent, and that he be free to act solely in the inmate's best interest.

In sum, although the State is free to appoint a licensed attorney to represent an inmate, it is not constitutionally required to do so. Due process will be satisfied so long as an inmate facing involuntary transfer to a mental hospital is provided qualified and independent assistance.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

It seems clear to me that this case is now moot. Accordingly, I would vacate the judgment and remand the case to

[2] The District Court specifically held that "a judicial officer is not required, and the decisionmaker need not be from outside the prison or hospital administration." *Miller* v. *Vitek*, 437 F. Supp. 569, 574 (Neb. 1977) (three-judge court).

the District Court with directions to dismiss the complaint. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36.

As the Court points out, this is not a class action, and the appellee is now incarcerated in the Nebraska Penal and Correctional Complex with an anticipated release date in March 1982. See *ante*, at 485–487, and n. 3. In that status, the appellee is simply one of thousands of Nebraska prisoners, with no more standing than any other to attack the constitutionality of Neb. Rev. Stat. § 83–180 (1) (1976) on the sole basis of the mere possibility that someday that statute might be invoked to transfer him to another institution.

Although the appellee was once transferred in accord with § 83–180 (1), there is no demonstrated probability that that will ever happen again. *Weinstein* v. *Bradford*, 423 U. S. 147. And this case is not one that by its nature falls within the ambit of the "capable of repetition, yet evading review" exception to established principles of mootness. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498; *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115. If the appellee should again be threatened with transfer under the allegedly infirm statute, there will be ample time to reach the merits of his claim.

" 'To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.' *Brownlow* v. *Schwartz*, 261 U. S. 216, 217–218." *Oil Workers* v. *Missouri*, 316 U. S. 363, 371.

MR. JUSTICE BLACKMUN, dissenting.

I agree with MR. JUSTICE STEWART that this case is not properly before us. I write separately to express my own reasons for reaching that conclusion.

The claimed harm that gave birth to this lawsuit was the alleged deprivation of liberty attending appellee's transfer to the Lincoln Regional Center. It is clear to me that that asserted injury disappeared, at the latest, when appellee was

granted parole.[1] Cf. *Preiser* v. *Newkirk*, 422 U. S. 395 (1975). So did any immediate threat that that injury would be suffered again. Appellee has been returned to custody, however, and the

[1] The Court does not appear to share this view. It states that, even while at the Veterans' Administration Hospital, appellee Jones "insisted that he was receiving treatment for mental illness against his will." *Ante*, at 486. It adds that appellee was "paroled, but only on condition that he accept psychiatric treatment." *Ibid.* The Court does not identify the precise import of these facts, but a fair inference is that they are meant to suggest that this case—even during the time of appellee's parole—might properly have been pursued on the theory that the appellee was continuing to feel the effects of the alleged deprivation of constitutional rights in receiving in-patient care at the Veterans' Administration Hospital.

I cannot accept this suggestion. First, its premise appears to be faulty. The District Court did not find, and it does not appear clearly in the record, that the parole board's offer or appellee's acceptance of parole was in any way related to his prior transfer to the Lincoln Regional Center. Appellee chose to accept conditional parole. Moreover, at the time appellee elected to go on parole, he was being housed at the penal complex, not at the Lincoln Regional Center. Thus, it is not surprising that the District Court based its finding of nonmootness solely on its conclusion that appellee—notwithstanding his conditioned release—was "under threat of being transferred to the state mental hospital under § 83-180." App. to Juris. Statement 24. Second, the "continuing injury" theory seems to me to be incorrect as a matter of law. Appellee did not seek or evince any interest in seeking release from the Veterans' Administration Hospital, and a declaration that his initial transfer had been illegal would have neither justified nor predictably led to appellee's removal from that facility. In other words, after accepting the conditional grant of parole, appellee could no longer show, as required by the case-or-controversy requirement, "that he personally would benefit in a tangible way from the court's intervention." *Warth* v. *Seldin*, 422 U. S. 490, 508 (1975).

The Court also finds some support for its holding in the fact that vacating the District Court's order would remove the declaration that the challenged procedures "afforded an inadequate basis for declaring Jones to be mentally ill." *Ante*, at 487. If the Court, by this statement, means to imply that appellee's suit is somehow mootness-proof due to the continuing stigma resulting from the transfer to the mental hospital, I cannot accept that sweeping proposition. The Court has never suggested that the "collateral consequences" doctrine of *Sibron* v. *New York*, 392 U. S. 40 (1968), which saves an action challenging the validity of a con-

parties agree that his reincarceration, coupled with his history of mental problems, has brought the controversy back to life.

Given these facts, the issue is not so much one of mootness as one of ripeness. At most, although I think otherwise, it is a case presenting a "mixed question" of ripeness and mootness, hinging on the possibility that the challenged procedures will be applied again to appellee. This Court has confronted mixed questions of this kind in cases presenting issues "capable of repetition, yet evading review," see, *e. g., Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), and *Sosna* v. *Iowa*, 419 U. S. 393 (1975), and in cases concerning the cessation of challenged conduct during the pendency of litigation, see, *e. g., Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 43 (1944). In those contexts, the Court has lowered the ripeness threshold so as to preclude manipulation by the parties or the mere passage of time from frustrating judicial review. MR. JUSTICE STEWART correctly observes, and the Court apparently concedes, however, that the "capable of repetition" doctrine does not apply here. Neither does the liberal rule applied in "voluntary cessation" cases, since the current state of affairs is in no way the product of the appellants' voluntary discontinuation of their challenged conduct.[2] Certainly it is not the result of any effort on the part of the appellants to avoid review by this Court. Thus, since these mixed mootness/ripeness rules are inapplicable, this case presents for me nothing more than a plain, old-fashioned question of ripeness.[3]

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viction after a prisoner has served his sentence, also saves a challenge to a commitment by a patient who has been released from a mental hospital. Nor does the logic of *Sibron*—focusing on tangible and remediable collateral consequences, such as use of a prior conviction to enhance a sentence for a later crime, or to impeach credibility if one appears as a witness—comfortably extend to the claim of a former mental patient. See *id.*, at 55 (referring to "adverse collateral legal consequences").

[2] The decisions to award and revoke parole were made by the Nebraska Parole Board, not by appellants.

[3] It is not clear whether the Court views this as a "voluntary cessation" case. It nowhere expressly relies on the doctrine and does not explain

The Court's cases lay down no mechanistic test for determining whether a dispute is ripe for adjudication. But past formulations are uniformly more rigorous than the one the Court now applies. The Court has observed that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy," *O'Shea* v. *Littleton*, 414 U. S. 488, 495 (1974), and that "general assertions or inferences" that illegal conduct will recur do not render a case ripe. *Id.*, at 497. "A hypothetical threat is not enough." *Public Workers* v. *Mitchell*, 330 U. S. 75, 90 (1947). There must be "actual present or immediately threatened injury resulting from unlawful governmental action." *Laird* v. *Tatum*, 408 U. S. 1, 15 (1972). See *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973) (requiring "some threatened or actual injury"); *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923) (requiring that the litigant "has sustained or is immediately in danger of sustaining some direct injury"). A "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" is required. *Golden* v. *Zwickler*, 394 U. S. 103, 108 (1969), quoting *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941).

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what factors might justify characterizing appellee's present situation as the result of voluntary cessation of illegal conduct by appellants. On the other hand, each of the three decisions cited by the Court to support its application of a "creampuff" ripeness standard, *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979); *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953), pivoted on the presence of "voluntary cessation." It is therefore unclear whether the Court deems this a "voluntary cessation" case (without explaining why) or deems the "no reasonable expectation of recurrence" standard—to date a litmus carefully confined by a policy-tailored and principled "voluntary cessation" rule—applicable to an amorphous cluster of facts having nothing to do with parties' artful dodging of well-founded litigation. In either event, the Court's analysis invites the criticism, increasingly voiced, that this Court's decisions on threshold issues "are concealed decisions on the merits of the underlying constitutional claim." Tushnet, The New Law of Standing: A Plea for Abandonment, 62 Cornell L. Rev. 663 (1977).

Applying these principles, I have difficulty in perceiving an existing "case or controversy" here. Since our remand, the state officials have indicated nothing more than that they have a general right to apply their statute, and to apply it to appellee if necessary.[4] They have not expressed a present intent or desire to transfer appellee to a mental facility pursuant to the challenged provisions. Nor have they suggested that they may transfer appellee to the Lincoln Regional Center now on the basis of the diagnosis made five years ago. And they have not suggested that they would subject appellee immediately to a "fresh" psychiatric evaluation if the District Court's injunction were lifted. The appellee has represented that he "does not reside in the psychiatric unit of the Nebraska Penal and Correctional Complex, nor is he receiving or accepting psychiatric treatment." Brief for Appellee 11–12. The brief containing that statement was filed some six months ago and some nine months after the revocation of appellee's parole.

In sum, for all that appears, appellee has been assimilated once again into the general prison population, and appellants, at least at this time, are content to leave him where he is.[5] Given these facts, determining whether prison officials within two years again will seek to send appellee to a mental institu-

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[4] Appellants, to be sure, have announced their intention to continue to use the challenged procedures. That fact, however, is of small, if any, significance, for it is hardly surprising to hear state officials say that they plan to abide by the State's own laws. See *Public Workers* v. *Mitchell*, 330 U. S. 75, 91 (1947) ("the existence of the law and the regulations" does not alone render a suit ripe). Cf. *Poe* v. *Ullman*, 367 U. S. 497 (1961) (desuetude statute).

[5] I do not go so far as MR. JUSTICE STEWART does when he says that appellee is "simply one of thousands of Nebraska prisoners." *Ante*, at 501. For purposes of the "case or controversy" requirement, appellee differs from his fellow inmates in two relevant respects: he has a recent history of perceived psychiatric problems, and in fact he was previously transferred pursuant to the challenged statutes. Cf. *O'Shea* v. *Littleton*, 414 U. S., at 496 ("Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury").

tion "takes us into the area of speculation and conjecture." *O'Shea* v. *Littleton*, 414 U. S., at 497. Cf. *Longshoremen* v. *Boyd*, 347 U. S. 222 (1954).

It is for these reasons that I would vacate the judgment of the District Court and remand the case to that court with directions to dismiss the complaint.

Syllabus

## BRANTI *v.* FINKEL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78–1654. Argued December 4, 1979—Decided March 31, 1980

Respondents, both Republicans, brought suit in Federal District Court to enjoin petitioner, a Democrat, who had recently been appointed Public Defender of Rockland County, N. Y., by the Democrat-dominated county legislature, from discharging respondents from their positions as Assistant Public Defenders. Finding that respondents had been satisfactorily performing their jobs and had been selected for termination solely because they were Republicans and that an assistant public defender is neither a policymaker nor a confidential employee, the District Court held that petitioner could not terminate respondents' employment consistent with the First and Fourteenth Amendments, and granted injunctive relief. The Court of Appeals affirmed.

*Held:* The First and Fourteenth Amendments protect respondents from discharge solely because of their political beliefs. Pp. 513–520.

(a) To prevail in this type of action, there is no requirement that dismissed government employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance. Rather, it was sufficient for respondents here to prove that they were about to be discharged "solely for the reason that they were not affiliated with or sponsored by the Democratic Party." *Elrod* v. *Burns*, 427 U. S. 347, 350. Pp. 513–517.

(b) The issue is not whether the label "policymaker" or "confidential" fits the particular public office in question, but rather whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office. Here, it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State. Whatever policymaking occurs in his office must relate to individual clients' needs and not to any partisan political interests. Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing on partisan political concerns. Under these circumstances,

it would undermine, rather than promote, the effective performance of an assistant public defender's office to make his tenure dependent on his allegiance to the dominant political party. Pp. 517–520.

598 F. 2d 609, affirmed.

STEVENS, J., delivered the opinion for the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, *post*, p. 520. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined and in Part I of which STEWART, J., joined, *post*, p. 521.

*Marc L. Parris* argued the cause for petitioner. With him on the briefs was *Charles Apotheker*.

*David MacRae Wagner* argued the cause and filed a brief for respondents.

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the First and Fourteenth Amendments to the Constitution protect an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs.

Respondents, Aaron Finkel and Alan Tabakman, commenced this action in the United States District Court for the Southern District of New York in order to preserve their positions as assistant public defenders in Rockland County, New York.[1] On January 4, 1978, on the basis of a showing that the petitioner public defender was about to discharge them solely because they were Republicans, the District Court entered a temporary restraining order preserving the status quo. After hearing evidence for eight days, the District Court entered detailed findings of fact and permanently enjoined[2] petitioner from terminating or attempting to terminate respondents' employment "upon the sole grounds of

[1] Jurisdiction was based on 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3).

[2] Pursuant to Rule 65 (a) (2) of the Federal Rules of Civil Procedure, the plenary trial was consolidated with the hearing on the application for a preliminary injunction.

their political beliefs." [3] 457 F. Supp. 1284, 1285 (1978). The Court of Appeals affirmed in an unpublished memorandum opinion, judgment order reported at 598 F. 2d 609 (CA2 1979) (table).

The critical facts can be summarized briefly. The Rockland County Public Defender is appointed by the County Legislature for a term of six years. He in turn appoints nine assistants who serve at his pleasure. The two respondents have served as assistants since their respective appointments in March 1971 and September 1975; they are both Republicans.[4]

Petitioner Branti's predecessor, a Republican, was appointed in 1972 by a Republican-dominated County Legislature. By 1977, control of the legislature had shifted to the Democrats and petitioner, also a Democrat, was appointed to replace the incumbent when his term expired. As soon as petitioner was formally appointed on January 3, 1978, he began executing termination notices for six of the nine assistants then in office. Respondents were among those who were to be terminated. With one possible exception, the nine who were to be appointed

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[3] The District Court explained that its ruling required petitioner to retain respondents in their prior positions, with full privileges as employees: "[C]ompliance with the judgment to be entered herein will require defendant both to permit plaintiffs to work as Assistants and to pay them the normal Assistant's salary. Mere payment of plaintiffs' salary will not constitute full compliance with the judgment entered herein; for plaintiffs' constitutional right, which is upheld herein, is the right not to be dismissed from public employment upon the sole ground of their political beliefs. Defendant cannot infringe that right of plaintiffs with impunity by the mere expedient of paying plaintiffs a sum of money." 457 F. Supp. 1284, 1285–1286, n. 4 (1978).

[4] The District Court noted that Finkel had changed his party registration from Republican to Democrat in 1977 in the apparent hope that such action would enhance his chances of being reappointed as an assistant when a new, Democratic public defender was appointed. The court concluded that, despite Finkel's formal change of party registration, the parties had regarded him as a Republican at all relevant times. *Id.*, at 1285, n. 2.

or retained were all Democrats and were all selected by Democratic legislators or Democratic town chairmen on a basis that had been determined by the Democratic caucus.[5]

The District Court found that Finkel and Tabakman had been selected for termination solely because they were Republicans and thus did not have the necessary Democratic sponsors:

> "The sole grounds for the attempted removal of plaintiffs were the facts that plaintiffs' political beliefs differed from those of the ruling Democratic majority in the County Legislature and that the Democratic majority had determined that Assistant Public Defender appointments were to be made on political bases." 457 F. Supp., at 1293.

The court rejected petitioner's belated attempt to justify the dismissals on nonpolitical grounds. Noting that both Branti and his predecessor had described respondents as "competent attorneys," the District Court expressly found that both had been "satisfactorily performing their duties as Assistant Public Defenders." *Id.*, at 1292.

Having concluded that respondents had been discharged solely because of their political beliefs, the District Court held that those discharges would be permissible under this Court's decision in *Elrod* v. *Burns*, 427 U. S. 347, only if

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[5] "An examination of the selection process that was employed in arriving at the name of each of the nine 1978 appointees shows that the hiring decisions were, for all practical purposes, made by Democratic legislators or chairpersons in accordance with the procedures that had been decided upon by the Democratic caucus, and, with respect to every selection save that of Sanchez, those procedures excluded from consideration candidates who were affiliated with a party other than the Democratic Party. Moreover, the evidence shows that the only reason for which Branti sought to terminate plaintiffs as Assistants was that they were not recommended or sponsored pursuant to the procedures that had been decided upon by the Democratic caucus." *Id.*, at 1288.

assistant public defenders are the type of policymaking, confidential employees who may be discharged solely on the basis of their political affiliations. The court concluded that respondents clearly did not fall within that category. Although recognizing that they had broad responsibilities with respect to particular cases that were assigned to them, the court found that respondents had "very limited, if any, responsibility" with respect to the overall operation of the public defender's office. They did not "act as advisors or formulate plans for the implementation of the broad goals of the office" and, although they made decisions in the context of specific cases, "they do not make decisions about the orientation and operation of the office in which they work." 457 F. Supp., at 1291.

The District Court also rejected the argument that the confidential character of respondents' work justified conditioning their employment on political grounds. The court found that they did not occupy any confidential relationship to the policymaking process, and did not have access to confidential documents that influenced policymaking deliberations. Rather, the only confidential information to which they had access was the product of their attorney-client relationship with the office's clients; to the extent that such information was shared with the public defender, it did not relate to the formulation of office policy.

In light of these factual findings, the District Court concluded that petitioner could not terminate respondents' employment as assistant public defenders consistent with the First and Fourteenth Amendments. On appeal, a panel of the Second Circuit affirmed, specifically holding that the District Court's findings of fact were adequately supported by the record. That court also expressed "no doubt" that the District Court "was correct in concluding that an assistant public defender was neither a policymaker nor a confidential employee." We granted certiorari, 443 U. S. 904, and now affirm.

Petitioner advances two principal arguments for reversal: [6] First, that the holding in *Elrod* v. *Burns* is limited to situations in which government employees are coerced into pledging allegiance to a political party that they would not voluntarily support and does not apply to a simple requirement that an employee be sponsored by the party in power; and, second, that, even if party sponsorship is an unconstitutional condition of continued public employment for clerks, deputies, and janitors, it is an acceptable requirement for an assistant public defender.

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[6] Petitioner also makes two other arguments. First, he contends that the action should have been dismissed because the evidence showed that he would have discharged respondents in any event due to their lack of competence as public defenders. See *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274. The Court of Appeals correctly held this contention foreclosed by the District Court's findings of fact, which it found to be adequately supported by the record. In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous. See *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275; *United States* v. *Ceccolini*, 435 U. S. 268, 273.

Second, relying on testimony that an assistant's term in office automatically expires when the public defender's term expires, petitioner argues that we should treat this case as involving a "failure to reappoint" rather than a dismissal and, as a result, should apply a less stringent standard. Petitioner argues that because respondents knew the system was a patronage system when they were hired, they did not have a reasonable expectation of being rehired when control of the office shifted to the Democratic Party. A similar waiver argument was rejected in *Elrod* v. *Burns*, 427 U. S. 347, 360, n. 13; see also *id.*, at 380 (POWELL, J., dissenting). After *Elrod*, it is clear that the lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs.

Unlike MR. JUSTICE POWELL in dissent, *post*, at 526–532, petitioner does not ask us to reconsider the holding in *Elrod*.

## I

In *Elrod* v. *Burns* the Court held that the newly elected Democratic Sheriff of Cook County, Ill., had violated the constitutional rights of certain non-civil-service employees by discharging them "because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders." 427 U. S., at 351. That holding was supported by two separate opinions.

Writing for the plurality, MR. JUSTICE BRENNAN identified two separate but interrelated reasons supporting the conclusion that the discharges were prohibited by the First and Fourteenth Amendments. First, he analyzed the impact of a political patronage system [7] on freedom of belief and association. Noting that in order to retain their jobs, the Sheriff's employees were required to pledge their allegiance to the Democratic Party, work for or contribute to the party's candidates, or obtain a Democratic sponsor, he concluded that the inevitable tendency of such a system was to coerce employees into compromising their true beliefs.[8] That conclusion, in

[7] MR. JUSTICE BRENNAN noted that many other practices are included within the definition of a patronage system, including placing supporters in government jobs not made available by political discharges, granting supporters lucrative government contracts, and giving favored wards improved public services. In that case, as in this, however, the only practice at issue was the dismissal of public employees for partisan reasons. 427 U. S., at 353; *id*, at 374 (opinion of STEWART, J.). In light of the limited nature of the question presented, we have no occasion to address petitioner's argument that there is a compelling governmental interest in maintaining a political sponsorship system for filling vacancies in the public defender's office.

[8] "An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. See *Buckley* v. *Valeo*, 424 U. S. 1,

his opinion, brought the practice within the rule of cases like *Board of Education* v. *Barnette*, 319 U. S. 624, condemning the use of governmental power to prescribe what the citizenry must accept as orthodox opinion.[9]

Second, apart from the potential impact of patronage dismissals on the formation and expression of opinion, MR. JUSTICE BRENNAN also stated that the practice had the effect of imposing an unconstitutional condition on the receipt of a public benefit and therefore came within the rule of cases like *Perry* v. *Sindermann*, 408 U. S. 593. In support of the holding in *Perry* that even an employee with no contractual right to retain his job cannot be dismissed for engaging in constitutionally protected speech, the Court had stated:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the govern-

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19 (1976). Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished." *Id.*, at 355–356.

MR. JUSTICE BRENNAN also indicated that a patronage system may affect freedom of belief more indirectly, by distorting the electoral process. Given the increasingly pervasive character of government employment, he concluded that the power to starve political opposition by commanding partisan support, financial and otherwise, may have a significant impact on the formation and expression of political beliefs.

[9] "Regardless of the nature of the inducement, whether it be by the denial of public employment or, as in *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), by the influence of a teacher over students, '[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *Id.*, at 642." *Id.*, at 356.

ment may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

. . . . .

"Thus, the respondent's lack of a contractual or tenure 'right' to re-employment for the 1969–1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton* v. *Tucker*, [364 U. S. 479]; *Keyishian* v. *Board of Regents*, [385 U. S. 589]. We reaffirm those holdings here." *Id.*, at 597–598.

If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes.[10] Under this line of analysis, unless the government can demonstrate "an over-

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[10] "The Court recognized in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947), that 'Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office. . . ."' This principle was reaffirmed in *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), which held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. And in *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 898 (1961), the Court recognized again that the government could not deny employment because of previous membership in a particular party." *Id.*, at 357–358.

riding interest," 427 U. S., at 368, "of vital importance," *id.*, at 362, requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

MR. JUSTICE STEWART's opinion concurring in the judgment avoided comment on the first branch of MR. JUSTICE BRENNAN's analysis, but expressly relied on the same passage from *Perry* v. *Sindermann* that is quoted above.

Petitioner argues that *Elrod* v. *Burns* should be read to prohibit only dismissals resulting from an employee's failure to capitulate to political coercion. Thus, he argues that, so long as an employee is not asked to change his political affiliation or to contribute to or work for the party's candidates, he may be dismissed with impunity—even though he would not have been dismissed if he had had the proper political sponsorship and even though the sole reason for dismissing him was to replace him with a person who did have such sponsorship. Such an interpretation would surely emasculate the principles set forth in *Elrod*. While it would perhaps eliminate the more blatant forms of coercion described in *Elrod*, it would not eliminate the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job.[11] More importantly, petitioner's interpretation would require the Court to repudiate entirely the conclusion of both MR. JUSTICE BRENNAN and MR. JUSTICE STEWART that the First Amend-

[11] As MR. JUSTICE BRENNAN pointed out in *Elrod*, political sponsorship is often purchased at the price of political contributions or campaign work in addition to a simple declaration of allegiance to the party. *Id.*, at 355. Thus, an employee's realization that he must obtain a sponsor in order to retain his job is very likely to lead to the same type of coercion as that described by the plurality in *Elrod*. While there was apparently no overt political pressure exerted on respondents in this case, the potentially coercive effect of requiring sponsorship was demonstrated by Mr. Finkel's change of party registration in a futile attempt to retain his position. See n. 4, *supra*.

ment prohibits the dismissal of a public employee solely because of his private political beliefs.

In sum, there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance. To prevail in this type of an action, it was sufficient, as *Elrod* holds, for respondents to prove that they were discharged "solely for the reason that they were not affiliated with or sponsored by the Democratic Party." 427 U. S., at 350.

## II

Both opinions in *Elrod* recognize that party affiliation may be an acceptable requirement for some types of government employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. *Id.*, at 366. In *Elrod*, it was clear that the duties of the employees—the chief deputy of the process division of the sheriff's office, a process server and another employee in that office, and a bailiff and security guard at the Juvenile Court of Cook County—were not of that character, for they were, as MR. JUSTICE STEWART stated, "nonpolicy-making, nonconfidential" employees. *Id.*, at 375.[12]

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[12] The plurality emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest. 427 U. S., at 362. That standard clearly was not met to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. Government funds, which are collected from taxpayers of all parties on a nonpolitical basis, cannot be expended for the benefit of one political party simply because that party has control of the government. The compensation of government employees, like the distribution of other public benefits, must be justified by a governmental purpose.

The Sheriff argued that his employees' political beliefs did have a bearing on the official duties they were required to perform because political

As MR. JUSTICE BRENNAN noted in *Elrod*, it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. *Id.*, at 367. Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee's governmental responsibilities.

It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government. On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

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loyalty was necessary to the continued efficiency of the office. But after noting the tenuous link between political loyalty and efficiency where process servers and clerks were concerned, the plurality held that any small gain in efficiency did not outweigh the employees' First Amendment rights. *Id.*, at 366.

Having thus framed the issue, it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State.[13] As we recently observed in commenting on the duties of counsel appointed to represent indigent defendants in federal criminal proceedings:

> "[T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation." *Ferri* v. *Ackerman*, 444 U. S. 193, 204.

Thus, whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests. Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing whatsoever on partisan political concerns. Under these circumstances, it would undermine, rather than promote, the effective performance of an assistant public

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[13] This is in contrast to the broader public responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty. Cf. *Newcomb* v. *Brennan*, 558 F. 2d 825 (CA7 1977), cert. denied, 434 U. S. 968 (dismissal of deputy city attorney).

defender's office to make his tenure dependent on his allegiance to the dominant political party.[14]

Accordingly, the entry of an injunction against termination of respondents' employment on purely political grounds was appropriate and the judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE STEWART, dissenting.

I joined the judgment of the Court in *Elrod* v. *Burns*, 427 U. S. 347, because it is my view that, under the First and Fourteenth Amendments, "a nonpolicymaking, nonconfidential government employee can[not] be discharged . . . from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.*, at 375. That judgment in my opinion does not control the present case for the simple reason

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[14] As the District Court observed at the end of its opinion, it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation:

"Perhaps not squarely presented in this action, but deeply disturbing nonetheless, is the question of the propriety of political considerations entering into the selection of attorneys to serve in the sensitive positions of Assistant Public Defenders. By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime? No 'compelling state interest' can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans)." 457 F. Supp., at 1293, n. 13.

In his brief petitioner attempts to justify the discharges in this case on the ground that he needs to have absolute confidence in the loyalty of his subordinates. In his dissenting opinion, MR. JUSTICE STEWART makes the same point, relying on an "analogy to a firm of lawyers in the private sector." *Post*, at 521. We cannot accept the proposition, however, that there cannot be "mutual confidence and trust" between attorneys, whether public defenders or private practitioners, unless they are both of the same political party. To the extent that petitioner lacks confidence in the assistants he has inherited from the prior administration for some reason other than their political affiliations, he is, of course, free to discharge them.

that the respondents here clearly are not "nonconfidential" employees.

The respondents in the present case are lawyers, and the employment positions involved are those of assistants in the office of the Rockland County Public Defender. The analogy to a firm of lawyers in the private sector is a close one, and I can think of few occupational relationships more instinct with the necessity of mutual confidence and trust than that kind of professional association.

I believe that the petitioner, upon his appointment as Public Defender, was not constitutionally compelled to enter such a close professional and necessarily confidential association with the respondents if he did not wish to do so.*

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, and with whom MR. JUSTICE STEWART joins as to Part I, dissenting.

The Court today continues the evisceration of patronage practices begun in *Elrod* v. *Burns*, 427 U. S. 347 (1976). With scarcely a glance at almost 200 years of American political tradition, the Court further limits the relevance of political affiliation to the selection and retention of public employees. Many public positions previously filled on the basis of membership in national political parties now must be staffed in accordance with a constitutionalized civil service standard that will affect the employment practices of federal, state, and local governments. Governmental hiring practices long thought to be a matter of legislative and executive discretion now will be subjected to judicial oversight. Today's decision is an exercise of judicial lawmaking that, as THE CHIEF JUSTICE wrote in his *Elrod* dissent, "represents a significant intrusion into the area of legislative and policy concerns." *Id.*, at 375. I dissent.

*Contrary to repeated statements in the Court's opinion, the present case does not involve "private political beliefs," but public affiliation with a political party.

## I

The Court contends that its holding is compelled by the First Amendment. In reaching this conclusion, the Court largely ignores the substantial governmental interests served by patronage. Patronage is a long-accepted practice [1] that never has been eliminated totally by civil service laws and regulations. The flaw in the Court's opinion lies not only in its application of First Amendment principles, see Parts II–IV, *infra*, but also in its promulgation of a new, and substantially expanded, standard for determining which governmental employees may be retained or dismissed on the basis of political affiliation.[2]

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[1] When Thomas Jefferson became the first Chief Executive to succeed a President of the opposing party, he made substantial use of appointment and removal powers. Andrew Jackson, the next President to follow an antagonistic administration, used patronage extensively when he took office. The use of patronage in the early days of our Republic played an important role in democratizing American politics. *Elrod* v. *Burns*, 427 U. S., at 378–379 (POWELL, J., dissenting). President Lincoln's patronage practices and his reliance upon the newly formed Republican Party enabled him to build support for his national policies during the Civil War. See E. McKitrick, Party Politics and the Union and Confederate War Efforts, in The American Party System 117, 131–133 (W. Chambers & W. Burnham eds. 1967). Subsequent patronage reform efforts were "concerned primarily with the corruption and inefficiency that patronage was thought to induce in civil service and the power that patronage practices were thought to give the 'professional' politicians who relied on them." *Elrod* v. *Burns*, 427 U. S., at 379 (POWELL, J., dissenting). As a result of these efforts, most federal and state civil service employment was placed on a nonpatronage basis. *Ibid.* A significant segment of public employment has remained, however, free from civil service constraints.

[2] The Court purports to limit the issue in this case to the dismissal of public employees. See *ante*, at 513, n. 7. Yet the Court also states that "it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation." *Ante*, at 520, n. 14. If this latter statement is not a holding of the Court, it at least suggests that the Court perceives no constitutional distinction between selection and dismissal of public employees.

In *Elrod* v. *Burns*, three Members of the Court joined a plurality opinion concluding that nonpolicymaking employees could not be dismissed on the basis of political affiliation. 427 U. S., at 367 (opinion of BRENNAN, J., with whom WHITE and MARSHALL, JJ., joined). Two Members of the Court joined an opinion concurring in the judgment and stating that nonpolicymaking, nonconfidential employees could not be so dismissed. *Id.*, at 375 (opinion of STEWART, J., with whom BLACKMUN, J., joined). Notwithstanding its purported reliance upon the holding of *Elrod*, *ante*, at 512, n. 6, the Court today ignores the limitations inherent in both views. The Court rejects the limited role for patronage recognized in the plurality opinion by holding that not all policymakers may be dismissed because of political affiliation. *Ante*, at 518–520. And the Court refuses to allow confidential employees to be dismissed for partisan reasons. *Ante*, at 520, n. 14; see *ante*, p. 520 (STEWART, J., dissenting). The broad, new standard is articulated as follows:

> "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Ante*, at 518.

The Court gives three examples to illustrate the standard. Election judges and certain executive assistants may be chosen on the basis of political affiliation; college football coaches may not. *Ibid.*[3] And the Court decides in this case that

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[3] The rationale for the Court's conclusion that election judges may be partisan appointments is not readily apparent. The Court states that "if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration." *Ante*, at 518. If the mere presence of a state law mandating political affiliation as a requirement for public employment were sufficient, then the Legisla-

party affiliation is not an appropriate requirement for selection of the attorneys in a public defender's office because "whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests." *Ante*, at 519.

The standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position. Legislative bodies will not be certain whether they have the final authority to make the delicate line-drawing decisions embodied in the civil service laws. Prudent individuals requested to accept a public appointment must consider whether their predecessors will threaten to oust them through legal action.

One example at the national level illustrates the nature and magnitude of the problem created by today's holding. The President customarily has considered political affiliation in removing and appointing United States attorneys. Given the critical role that these key law enforcement officials play in the administration of the Department of Justice, both Democratic and Republican Attorneys General have concluded, not surprisingly, that they must have the confidence and support of the United States attorneys. And political affiliation has been used as one indicator of loyalty.[4]

Yet, it would be difficult to say, under the Court's standard, that "partisan" concerns properly are relevant to the performance of the duties of a United States attorney. This

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ture of Rockland County could reverse the result of this case merely by passing a law mandating that political affiliation be considered when a public defender chooses his assistants. Moreover, it is not apparent that a State could demonstrate, under the standard approved today, that only a political partisan is qualified to be an impartial election judge.

[4] See Lemann, The Case for Political Patronage, The Washington Monthly, Dec. 1977, p. 8.

Court has noted that " '[t]he office of public prosecutor is one which must be administered with courage and independence.' " *Imbler* v. *Pachtman*, 424 U. S. 409, 423 (1976), quoting *Pearson* v. *Reed*, 6 Cal. App. 2d 277, 287, 44 P. 2d 592, 597 (1935). Nevertheless, I believe that the President must have the right to consider political affiliation when he selects top ranking Department of Justice officials. The President and his Attorney General, not this Court, are charged with the responsibility for enforcing the laws and administering the Department of Justice. The Court's vague, overbroad decision may cast serious doubt on the propriety of dismissing United States attorneys, as well as thousands of other policymaking employees at all levels of government, because of their membership in a national political party.[5]

A constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel. Federal judges will now be the final arbiters as to who federal, state, and local governments may employ. In my view, the Court is not justified in removing decisions so essential to

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[5] The Court notes that prosecutors hold "broader public responsibilities" than public defenders. *Ante*, at 519, n. 13. The Court does not suggest, however, that breadth of responsibility correlates with the appropriateness of political affiliation as a requirement for public employment. Indeed, such a contention would appear to be inconsistent with the Court's assertion that the "ultimate inquiry is not whether the label 'policymaker' . . . fits a particular position. . . ." *Ante*, at 518.

I do not suggest that the Constitution requires a patronage system. Civil service systems have been designed to eliminate corruption and inefficiency not to protect the political beliefs of public employees. Indeed, merit selection systems often impose restrictions on political activities by public employees. D. Rosenbloom, Federal Service and the Constitution: The Development of the Public Employment Relationship 83–86 (1971); see *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973). Of course, civil service systems further important governmental goals, including continuity in the operation of government. A strength of our system has been the blend of civil service and patronage appointments, subject always to oversight and change by the legislative branches of government.

responsible and efficient governance from the discretion of legislative and executive officials.

## II

The Court errs not only in its selection of a standard, but more fundamentally in its conclusion that the First Amendment prohibits the use of membership in a national political party as a criterion for the dismissal of public employees.[6] In reaching this conclusion, the Court makes new law from inapplicable precedents. The Court suggests that its decision is mandated by the principle that governmental action may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." *Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943). The Court also relies upon the decisions in *Perry* v. *Sindermann*, 408 U. S. 593 (1972), and *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). *Ante*, at 514–515; see *Elrod* v. *Burns*, 427 U. S., at 358–359 (opinion of BRENNAN, J.). But the propriety of patronage was neither questioned nor addressed in those cases.

Both *Keyishian* and *Perry* involved faculty members who were dismissed from state educational institutions because of their political views.[7] In *Keyishian*, the Court reviewed a

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[6] In my *Elrod* dissent, I suggested that public employees who lose positions obtained through their participation in the patronage system have not suffered a loss of First Amendment rights. 427 U. S., at 380–381. Such employees assumed the risks of the system and were benefited, not penalized, by its practical operation. But the Court bases its holding on the First Amendment and, accordingly, I consider the constitutional issue.

[7] *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), did not involve public employment. In that case, the Court declared that a state statute compelling each public school student to pledge allegiance to the flag violated the First Amendment. Similarly, *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), *Shelton* v. *Tucker*, 364 U. S. 479 (1960), and *Cafeteria Workers* v. *McElroy*, 367 U. S. 886 (1961), did not concern governmental attempts to hire or dismiss employees pursuant to an established patronage system. The Court also relies upon *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947). *Ante*, at 515, n. 10. In that case, the Court upheld limitations

state statute that permitted dismissals of faculty members from state institutions for "treasonable or seditious" utterances or acts. The Court noted that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." 385 U. S., at 603. Because of the ambiguity in the statutory language, the Court held that the law was unconstitutionally vague. The Court also held that membership in the Communist Party could not automatically disqualify a person from holding a faculty position in a state university. *Id.*, at 606. In *Perry*, the Court held that the Board of Regents of a state university system could not discharge a professor in retaliation for his exercise of free speech. 408 U. S., at 598. In neither case did the State suggest that the governmental positions traditionally had been regarded as patronage positions. Thus, the Court correctly held that no substantial state interest justified the infringement of free speech. This case presents a question quite different from that in *Keyishian* and *Perry*.

The constitutionality of appointing or dismissing public employees on the basis of political affiliation depends upon the governmental interests served by patronage. No constitutional violation exists if patronage practices further sufficiently important interests to justify tangential burdening of First Amendment rights. See *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976). This inquiry cannot be resolved by reference to First Amendment cases in which patronage was neither involved nor discussed. Nor can the question in this case be answered in a principled manner without identifying and weighing the governmental interest served by patronage.

## III

Patronage appointments help build stable political parties by offering rewards to persons who assume the tasks necessary

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on the political conduct of public employees that far exceed any burden on First Amendment rights demonstrated in this case.

to the continued functioning of political organizations. "As all parties are concerned with power they naturally operate by placing members and supporters into positions of power. Thus there is nothing derogatory in saying that a primary function of parties is patronage." J. Jupp, Political Parties 25–26 (1968). The benefits of patronage to a political organization do not derive merely from filling policymaking positions on the basis of political affiliation. Many, if not most, of the jobs filled by patronage at the local level may not involve policymaking functions.[8] The use of patronage to fill such positions builds party loyalty and avoids "splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government." *Storer* v. *Brown*, 415 U. S. 724, 736 (1974).

Until today, I would have believed that the importance of political parties was self-evident. Political parties, dependent in many ways upon patronage, serve a variety of substantial governmental interests. A party organization allows political candidates to muster donations of time and money necessary to capture the attention of the electorate. Particularly in a time of growing reliance upon expensive television advertisements, a candidate who is neither independently wealthy nor capable of attracting substantial contributions must rely upon party workers to bring his message to the voters.[9] In contests for less visible offices, a candidate may have no efficient method of appealing to the voters unless he enlists the efforts of persons who seek reward through the patronage system. Insofar as the Court's decision today

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[8] See E. Costikyan, Behind Closed Doors: Politics in the Public Interest 253–254 (1966).

[9] Television and radio enable well-financed candidates to go directly into the homes of voters far more effectively than even the most well-organized "political machine." See D. Broder, The Party's Over: The Failure of Politics in America 239–240 (1972).

limits the ability of candidates to present their views to the electorate, our democratic process surely is weakened.[10]

Strong political parties also aid effective governance after election campaigns end. Elected officials depend upon appointees who hold similar views to carry out their policies and administer their programs. Patronage—the right to select key personnel and to reward the party "faithful"—serves the public interest by facilitating the implementation of policies endorsed by the electorate.[11] The Court's opinion casts a shadow over this time-honored element of our system. It appears to recognize that the implementation of policy is a legitimate goal of the patronage system and that some, but not all, policymaking employees may be replaced on the basis of their political affiliation. *Ante*, at 518.[12] But the Court

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[10] Patronage also attracts persons willing to perform the jobs that enable voters to gain easy access to the electoral process. In some localities, "[t]he parties saw that the polls were open when they should be, and that the voting machines worked." Costikyan, Cities *Can* Work, Saturday Review, Apr. 4, 1970, pp. 19, 20. At a time when the percentage of Americans who vote is declining steadily, see Statistical Abstract of the United States 516 (1979), the citizen who distributes his party's literature, who helps to register voters, or who transports voters to the polls on Election Day performs a valuable public service.

[11] In addition, political parties raise funds, recruit potential candidates, train party workers, provide assistance to voters, and act as a liaison between voters and governmental bureaucracies. Assistance to constituents is a common form of patronage. At the local level, political clubhouses traditionally have helped procure municipal services for constituents who often have little or no other access to public officials. M. Tolchin & S. Tolchin, To The Victor . . .: Political Patronage from the Clubhouse to the White House 19 (1971). Party organizations have been a means of upward mobility for newcomers to the United States and members of minority groups. See *Elrod* v. *Burns*, 427 U. S., at 382, and n. 6 (POWELL, J., dissenting); S. Lubell, The Future of American Politics 76–77 (1952).

[12] The reasoning of the *Elrod* plurality clearly permitted vestiges of patronage to continue in order to ensure that "representative government not be undercut by tactics obstructing the implementation of policies of the new administration. . . ." 427 U. S., at 367. But in view of the

does not recognize that the implementation of policy often depends upon the cooperation of public employees who do not hold policymaking posts. As one commentator has written: "What the Court forgets is that, if government is to work, policy implementation is just as important as policymaking. No matter how wise the chief, he has to have the right Indians to transform his ideas into action, to get the job done." [13] The growth of the civil service system already has limited the ability of elected politicians to effect political change. Public employees immune to public pressure "can resist changes in policy without suffering either the loss of their jobs or a cut in their salary." [14] Such effects are proper when they follow from legislative or executive decisions to withhold some jobs from the patronage system. But the Court tips the balance between patronage and nonpatronage positions, and, in my view, imposes unnecessary constraints upon the ability of responsible officials to govern effectively and to carry out new policies.

Although the Executive and Legislative Branches of Government are independent as a matter of constitutional law, effective government is impossible unless the two Branches cooperate to make and enforce laws. Over the decades of our national history, political parties have furthered—if not assured—a measure of cooperation between the Executive and

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Court's new holding that some policymaking positions may not be filled on the basis of political affiliation, *ante*, at 518, elected officials may find changes in public policy thwarted by policymaking employees protected from replacement by the Constitution. The official with a hostile or foot-dragging subordinate will now be in a difficult position. In order to replace such a subordinate, he must be prepared to prove that the subordinate's "private political beliefs [will] interfere with the discharge of his public duties." *Ante*, at 517.

[13] Peters, A Kind Word for the Spoils System, The Washington Monthly, Sept. 1976, p. 30.

[14] Tolchin & Tolchin, *supra* n. 11, at 72–73. See Costikyan, *supra* n. 8, at 353–354.

Legislative Branches. A strong party allows an elected executive to implement his programs and policies by working with legislators of the same political organization. But legislators who owe little to their party tend to act independently of its leadership. The result is a dispersion of political influence that may inhibit a political party from enacting its programs into law.[15] The failure to sustain party discipline, at least at the national level, has been traced to the inability of successful political parties to offer patronage positions to their members or to the supporters of elected officials.[16]

The breakdown of party discipline that handicaps elected officials also limits the ability of the electorate to choose wisely among candidates. Voters with little information about individuals seeking office traditionally have relied upon party affiliation as a guide to choosing among candidates. With the decline in party stability, voters are less able to blame or credit a party for the performance of its elected officials. Our national party system is predicated upon the assumption that political parties sponsor, and are responsible for, the performance of the persons they nominate for office.[17]

In sum, the effect of the Court's decision will be to decrease the accountability and denigrate the role of our national political parties. This decision comes at a time when an increasing number of observers question whether our national political parties can continue to operate effectively.[18]

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[15] Herbers, The Party's Over for the Political Parties, The New York Times Magazine, Dec. 9, 1979, pp. 158, 175.

[16] See Costikyan, *supra* n. 8, at 252–253.

[17] In local elections, a candidate's party affiliation may be the most salient information communicated to voters. One study has indicated that affiliation remains the predominant influence on voter choice in low-visibility elections such as contests for positions in the state legislature. See Murray & Vedlitz, Party Voting in Lower-Level Electoral Contests, 59 Soc. Sci. Q. 752, 756 (1979).

[18] See, *e. g.*, W. Burnham, The 1976 Election: Has the Crisis Been Adjourned?, in American Politics and Public Policy 1, 19–22 (W. Burnham & M. Weinberg eds. 1978); Broder, *supra* n. 9; Herbers, *supra* n. 15,

Broad-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy. The Court ignores the substantial governmental interests served by reasonable patronage. In my view, its decision will seriously hamper the functioning of stable political parties.

IV

The facts of this case also demonstrate that the Court's decision well may impair the right of local voters to structure their government. Consideration of the form of local government in Rockland County, N. Y., demonstrates the antidemocratic effect of the Court's decision.

The voters of the county elect a legislative body. Among the responsibilities that the voters give to the legislature is the selection of a county public defender. In 1972, when the county voters elected a Republican majority in the legislature, a Republican was selected as Public Defender. The Public Defender retained one respondent and appointed the other as Assistant Public Defenders. Not surprisingly, both respondents are Republicans. In 1976, the voters elected a majority of Democrats to the legislature. The Democratic majority, in turn, selected a Democratic Public Defender who replaced both respondents with Assistant Public Defenders approved by the Democratic legislators. *Ante*, at 509–510, and n. 5.

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at 159; Pomper, The Decline of the Party in American Elections, 92 Pol. Sci. Q. 21, 40–41 (1977). See also n. 9, *supra*.

The voters of Rockland County are free to elect their public defender and assistant public defenders instead of delegating their selection to elected and appointed officials.[19] Certainly the Court's holding today would not preclude the voters, the ultimate "hiring authority," from choosing both public defenders and their assistants by party membership. The voters' choice of public officials on the basis of political affiliation is not yet viewed as an inhibition of speech; it is democracy. Nor may any incumbent contend seriously that the voters' decision not to re-elect him because of his political views is an impermissible infringement upon his right of free speech or affiliation. In other words, the operation of democratic government depends upon the selection of elected officials on precisely the basis rejected by the Court today.

Although the voters of Rockland County could have elected both the public defender and his assistants, they have given their legislators a representative proxy to appoint the public defender. And they have delegated to the public defender the power to choose his assistants. Presumably the voters have adopted this course in order to facilitate more effective representative government. Of course, the voters could have instituted a civil service system that would preclude the selection of either the public defender or his assistants on the basis of political affiliation. But the continuation of the present system reflects the electorate's decision to select certain public employees on the basis of political affiliation.

The Court's decision today thus limits the ability of the voters of a county to structure their democratic government in the way that they please. Now those voters must elect both the public defender and his assistants if they are to fill governmental positions on a partisan basis.[20] Because voters

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[19] In Florida, for example, the local public defender is elected. See Fla. Const., Art. 5, § 18; Fla. Stat. § 27.50 (1979).

[20] The Court's description of the policymaking functions of a public defender's office suggests that the public defender may no longer be chosen by the County Legislature on a partisan basis. *Ante*, at 519–520.

certainly may elect governmental officials on the basis of party ties, it is difficult to perceive a constitutional reason for prohibiting them from delegating that same authority to legislators and appointed officials.

## V

The benefits of political patronage and the freedom of voters to structure their representative government are substantial governmental interests that justify the selection of the assistant public defenders of Rockland County on the basis of political affiliation. The decision to place certain governmental positions within a civil service system is a sensitive political judgment that should be left to the voters and to elected representatives of the people. But the Court's constitutional holding today displaces political responsibility with judicial fiat. In my view, the First Amendment does not incorporate a national civil service system. I would reverse the judgment of the Court of Appeals.

# UNITED STATES *v.* MITCHELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 78–1756. Argued December 3, 1979—Decided April 15, 1980

Section 1 of the Indian General Allotment Act of 1877 authorizes the President to allot to each Indian residing on a reservation specified acreage of agricultural and grazing land within the reservation; § 2 provides that all such allotments shall be selected by the Indians so as to include improvements made by them; and § 5 provides that the United States shall retain title to such allotted lands in trust for the benefit of the allottees. Pursuant to the Act, the Government allotted all of the Quinault Reservation's land in trust to individual Indians. Respondents, individual allottees of land in that Reservation, the Quinault Tribe, which now holds some allotments, and an association of allottees, brought actions, consolidated in the Court of Claims, to recover damages from the Government for alleged mismanagement of timber resources found on the Reservation. Denying the Government's motion to dismiss the actions on the alleged ground that it had not waived its sovereign immunity with respect to the asserted claims, the Court of Claims held that the General Allotment Act created a fiduciary duty on the United States' part to manage the timber resources properly and constituted a waiver of sovereign immunity against a suit for money damages as compensation for breaches of that duty.

*Held:* The General Allotment Act cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands, and thus does not provide respondents with a cause of action for the damages sought. Pp. 538–546.

(a) Neither the Tucker Act, under which the individual claimants premised jurisdiction in the Court of Claims, nor § 24 of the Indian Claims Commission Act, on which jurisdiction over the Tribe's claim was based, confers a substantive right against the United States to recover money damages. Pp. 538–540.

(b) The General Allotment Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources. The language of § 5 of the Act must be read *in pari materia* with the language of §§ 1 and 2, both of which indicate that the Indian allottee, and not a representative of the United States, is responsible for using the land for agricultural or grazing purposes. The Act's legislative history also

indicates that the trust Congress placed on allotted lands is of limited scope, it appearing that when Congress enacted the Act it intended that the United States hold the lands in trust not because it wished the Government to control use of the lands and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the lands and to ensure that allottees would be immune from state taxation. Furthermore, certain events surrounding and following the Act's passage indicate that it should not be read as authorizing, much less requiring, the Government to manage timber resources for the benefit of Indian allottees. Pp. 540–546.

219 Ct. Cl. 95, 591 F. 2d 1300, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 546. BURGER, C. J., took no part in the decision of the case.

*Deputy Solicitor General Claiborne* argued the cause for the United States. On the briefs were *Solicitor General McCree, Acting Assistant Attorney General Sagalkin,* and *Robert L. Klarquist.*

*Charles A. Hobbs* argued the cause for respondents. With him on the brief was *Jerry R. Goldstein.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether the Indian General Allotment Act of 1887 authorizes the award of money damages against the United States for alleged mismanagement of forests located on lands allotted to Indians under that Act.

## I

In 1873, a Reservation was established by Executive Order in the State of Washington for the Quinault Tribe. 1 C. Kappler, Indian Affairs 923 (2d ed. 1904). Much of the land within the Reservation was forested. By 1935, acting under the authority of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.*, the Government had allotted all of the Reservation's land in trust

to individual Indians. Other enactments of Congress require the Secretary of the Interior to manage these forests, sell the timber, and pay the proceeds of such sales, less administrative expenses, to the allottees.[1]

The respondents are 1,465 individual allottees of land contained in the Quinault Reservation, the Quinault Tribe, which now holds some allotments, and the Quinault Allottees Association, an unincorporated association formed to promote the interests of the allottees of the Quinault Reservation. In four actions consolidated in the Court of Claims, the respondents sought to recover damages from the Government for alleged mismanagement of timber resources found on the Reservation. The respondents asserted that the Government: (1) failed to obtain fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis and to rehabilitate the land after logging; (3) failed to obtain payment for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottees for roads; (5) failed to pay interest on certain funds and paid insufficient interest on other funds; and (6) exacted excessive administrative charges from allottees. The respondents contended that they were entitled to recover money damages because this alleged misconduct breached a fiduciary duty owed to them by the United States as trustee of the allotted lands under the General Allotment Act.

The United States moved to dismiss the respondents' actions on the ground that it had not waived its sovereign

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[1] Current statutes relevant to the Secretary's responsibilities with respect to Indian timber resources include 25 U. S. C. § 162a (investment of funds of tribe and individual allottee); 25 U. S. C. §§ 318a, 323–325 (roads and rights-of-way); 25 U. S. C. §§ 349, 372 (issuance of fee patents to allottees or heirs found to be capable of managing their affairs); 25 U. S. C. §§ 406, 407 (sale of timber); 25 U. S. C. § 413 (collection of administrative expenses incurred on behalf of Indians); 25 U. S. C. § 466 (sustained-yield management of forests).

immunity with respect to the claims raised. The Court of Claims, sitting en banc, denied the Government's motion. 219 Ct. Cl. 95, 591 F. 2d 1300 (1979). Reasoning that Government mismanagement of the kind alleged breaches the Government's fiduciary duty under the General Allotment Act, the court held that the Act provides Indian allottees a cause of action for money damages against the United States.

We granted certiorari, 442 U. S. 940 (1979), and now reverse and remand.

## II

It is elementary that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U. S. 584, 586 (1941). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U. S. 1, 4 (1969). In the absence of clear congressional consent, then, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States* v. *Sherwood*, *supra*, at 587–588.

The individual claimants in this action premised jurisdiction in the Court of Claims upon the Tucker Act, 28 U. S. C. § 1491, which gives that court jurisdiction of "any claim against the United States founded either upon the Constitution, or any Act of Congress." The Tucker Act is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U. S. 392, 398 (1976). The Act merely "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." *Ibid.* The individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims.

The same is true for the tribal claimant. Jurisdiction over

its claims was based on § 24 of the Indian Claims Commission Act, 28 U. S. C. § 1505. That provision states:

> "The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

By enacting this statute, Congress plainly intended to give tribal claimants the same access to the Court of Claims provided to individuals by the Tucker Act. The House Committee Report stated:

> "As respects claims accruing after its adoption this bill confers jurisdiction on the Court of Claims to determine and adjudicate any tribal claim of a character which would be cognizable in the Court of Claims if the claimant were not an Indian tribe. In such cases the claimants are to be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, . . . as in cases brought in the Court of Claims by non-Indians under section 145 of the Judicial Code [now 28 U. S. C. § 1491], as amended." H. R. Rep. No. 1466, 79th Cong., 1st Sess., 13 (1945).

See also Hearings on H. R. 1198 and H. R. 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess., 149 (1945) (statement of Assistant Solicitor Cohen); H. R. Rep. No. 352, 81st Cong., 1st Sess., 15–16 (1949) (recodifying the statute).

Under 28 U. S. C. § 1505, then, tribal claimants have the same access to the Court of Claims provided to individual claimants by 28 U. S. C. § 1491, and the United States is entitled to the same defenses at law and in equity under both statutes. It follows that 28 U. S. C. § 1505 no more confers a substantive right against the United States to recover money damages than does 28 U. S. C. § 1491.[2]

## III

Section 1 of the General Allotment Act authorizes the President to allot to each Indian residing on a reservation up to 80 acres of agricultural land or 160 acres of grazing land found within the reservation. 24 Stat. 388, as amended, 25 U. S. C. § 331. Section 5 of the Act provides that the United

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[2] For claims arising before August 13, 1946, however, the statute did waive the sovereign immunity of the United States. The Indian Claims Commission was directed to "hear and determine" such claims against the United States based on legal and equitable principles and on considerations of "fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U. S. C. § 70a.

Contrary to respondents' assertions, the comments of then-Representative Jackson, the sponsor of the bill that became 28 U. S. C. § 1505, do not indicate that Congress intended this statute to be a waiver of sovereign immunity for any alleged breach of trust accruing after August 13, 1946. Indeed, Representative Jackson stated that "the bill provides that with respect to all grievances that may arise hereafter Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims." 92 Cong. Rec. 5313 (1946). This statement is consistent with his comment that if the bill was adopted "it will never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future." *Ibid.* Such misappropriations could constitute takings for which just compensation is required by the Fifth Amendment, and this Court has long held that such a claim is within the jurisdiction of the Court of Claims under 28 U. S. C. § 1491. See *United States* v. *Testan*, 424 U. S. 392, 401 (1976); *United States* v. *Creek Nation*, 295 U. S. 103, 109–110 (1935); *Jacobs* v. *United States*, 290 U. S. 13, 16 (1933).

States shall retain title to such allotted lands in trust for the benefit of the allottees:

> "Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . and that at the expiration of said period the United States will convey the same by patent to said Indian . . . , in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." 24 Stat. 389, as amended, 25 U. S. C. § 348.

Under § 2 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 462, the United States now holds title to these lands indefinitely.

The Court of Claims held that the General Allotment Act creates a fiduciary duty on the part of the United States to manage timber resources properly and constitutes a waiver of sovereign immunity against a suit for money damages as compensation for breaches of that duty. The court drew both of these conclusions from the Act's language providing that the United States is to "hold the land . . . in trust for the sole use and benefit of the" allottee. The court held that this language created an express trust, and concluded that money damages are available to compensate for breaches of this trust, apparently because that remedy is available in the

ordinary situation in which a trustee has violated a fiduciary duty and because without money damages allottees would have no effective redress for breaches of trust.

We need not consider whether, had Congress actually intended the General Allotment Act to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity. We conclude that the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources.

The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands. The language of § 5 that imposes the trust in question must be read *in pari materia* with the language of §§ 1 and 2.[3] Both of these sections indicate that the Indian allottee, and not a representative of the United States, is responsible for using the land for agri-

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[3] As originally enacted, § 1 provided in pertinent part:

"[I]n all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, . . . the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon. . . ." 24 Stat. 388.

This language has not been materially altered by amendment, and is presently codified as 25 U. S. C. § 331.

Section 2 provided in pertinent part:

"That all allotments set apart under the provisions of this act shall be selected by the Indians . . . in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them. . . ." 24 Stat. 388.

This provision has never been amended, and is presently codified as 25 U. S. C. § 332.

cultural or grazing purposes. Furthermore, the legislative history of the Act[4] plainly indicates that the trust Congress placed on allotted lands is of limited scope. Congress intended that, even during the period in which title to allotted land would remain in the United States, the allottee would occupy the land as a homestead for his personal use in agriculture or grazing. See *Mattz* v. *Arnett*, 412 U. S. 481, 496 (1973); 13 Cong. Rec. 3211 (1882) (Sen. Dawes) (the allottee is to be "the occupant of the land and enjoy all its use"). See also H. R. Rep. No. 2247, 48th Cong., 2d Sess., 1 (1885); 17 Cong. Rec. 1630–1631 (1886) (Sens. Plumb and Dawes); *id.*, at 1632 (Sen. Maxey); 18 Cong. Rec. 190–191 (1886) (Rep. Skinner). Under this scheme, then, the allottee, and not the United States, was to manage the land.

The earliest drafts of the Act provided that, during the 25-year period before the allottee would receive fee simple title, the allottee would hold title to the land subject to a restraint on alienation. S. 1773, 46th Cong., 3d Sess. (1880); S. 1455, 47th Cong., 1st Sess. (1882). On Senator Dawes' motion, this language was amended to provide that the United States would hold the land "in trust" for that period. 13 Cong. Rec. 3212 (1882). Senator Dawes explained that the statute as amended would still ensure that title to the land would be transferred to the Indian allottee at the expiration of 25 years. He promoted the amendment because he feared that States might attempt to tax allotted lands if the allottees held title to them subject to a restraint on alienation. By placing title in the United States in trust for the

[4] A bill similar to the General Allotment Act of 1887 was debated in the Senate in 1881. See S. 1773, 46th Cong., 3d Sess. (1880); 11 Cong. Rec. 778–788, 873–882, 904–913, 933–943, 994–1003, 1028–1036, 1060–1070 (1881). Bills essentially identical to the Act as enacted in 1887 were passed by the Senate in 1882 and 1884, but were not acted upon by the House of Representatives. See S. 1455, 47th Cong., 1st Sess. (1882); S. 48, 48th Cong., 1st Sess. (1884). See also 13 Cong. Rec. 3212 (1882); 15 Cong. Rec. 2240–2242, 2277–2280 (1884); 16 Cong. Rec. 218, 580 (1885); H. R. Rep. No. 2247, 48th Cong., 2d Sess. (1885).

allottee, his amendment made it "impossible to raise the question of [state] taxation." *Id.*, at 3211. The next draft of the Act introduced in the Congress reflected this amendment, see S. 48, 48th Cong., 1st Sess. (1884), as, of course, did the Act as enacted, 24 Stat. 388 (1887). It is plain, then, that when Congress enacted the General Allotment Act, it intended that the United States "hold the land . . . in trust" not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation.[5]

[5] See also 15 Cong. Rec. 2240–2242 (1884) (Sens. Dawes, Coke, and Conger); *id.*, at 2278–2279 (Sens. Miller, Coke, and Dawes). Representative Skinner, who was the sponsor in the House of Representatives for the bill that became the Act, plainly defined the limited nature of the trust language found in § 5 in commenting on the rationale supporting both the Act's allotment of land and its provision that allottees shall be citizens of the United States:

"The present Commissioner of Indian Affairs, who, in the line of his duty, has given these questions his most earnest thought, says in his annual report, 1885, and reiterates it in his last report, that it should be impressed upon the Indians 'that they must abandon their tribal relation and take lands in severalty as the corner-stone of their complete success in agriculture. . . .'

. . . . . .

". . . [W]henever a majority of the male adults on any reservation desire it the reservation can be broken up, and the lands, in certain quantities, specified in the bill, allotted in severalty to the Indians who belong on such reservation; and as soon as the allotment is made the allottee becomes a citizen of the United States, . . . and, in addition thereto, his land *is made inalienable and non-taxable* for a sufficient length of time for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man who might attempt to cheat him out of his newly acquired property. . . .

"Giving the individual Indian a title to the land upon which he resides will have a tendency to stimulate him to work and improve his land and accumulate property. . . ." 18 Cong. Rec. 190 (1886) (emphasis added).

Representative Perkins summarized this approach by stating that "[t]he bill provides for the breaking up, as rapidly as possible, of all the tribal

Furthermore, events surrounding and following the passage of the General Allotment Act indicate that the Act should not be read as authorizing, much less requiring, the Government to manage timber resources for the benefit of Indian allottees. In 1874, this Court determined that Indians held only a right of occupancy, and not title, to Indian lands, and therefore that they could cut timber for the purpose of clearing the land, but not for the primary purpose of marketing the timber. *United States* v. *Cook*, 19 Wall. 591. In 1889, two years after the General Allotment Act was enacted, the Attorney General determined that the rule of *United States* v. *Cook*, *supra*, applied to allotted as well as unallotted lands, unless a statute explicitly provided to the contrary. 19 Op. Atty. Gen. 232. Congress ratified the Attorney General's opinion by enacting a provision authorizing the sale of dead timber on Indian allotments and reservations, but forbidding the sale of live timber. Act of Feb. 16, 1889, ch. 172, 25 Stat. 673. See also *Pine River Logging Co.* v. *United States*, 186 U. S. 279 (1902).

As time passed, Congress occasionally passed legislation authorizing the harvesting and sale of timber on specific reservations. See, *e. g.*, ch. 1350, 34 Stat. 91 (1906) (Jicarilla Apache Reservation). In 1910, Congress reversed its general policy. It empowered the Secretary of the Interior to sell timber on unallotted lands and apply the proceeds of the sales, less administrative expenses, to the benefit of the Indians. Ch. 431, § 7, 36 Stat. 857, as amended, 25 U. S. C. § 407. The Secretary was also authorized to consent to the sale of timber by the owner of any Indian land "held under a trust or other patent containing restrictions on alienations." *Id.*, § 8, as amended, 25 U. S. C. § 406 (a). The Secretary

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organizations and for the allotment of lands to the Indians in severalty, in order that they may possess them individually and proceed to qualify themselves for the duties and responsibilities of citizenship." *Id.*, at 191. He asserted that one object of the bill was to enable Indians "to support themselves by industry and toil." *Ibid.*

was directed to pay the proceeds of these sales, less administrative expenses, to the "owner" of the allotted lands. *Ibid.* Congress subsequently enacted other legislation directing the Secretary on how to manage Indian timber resources.[6]

The General Allotment Act, then, cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands. Any right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than that Act.[7]

The judgment of the Court of Claims is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

THE CHIEF JUSTICE took no part in the decision of this case.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, dissenting.

In *United States* v. *Testan*, 424 U. S. 392 (1976), we held that a statute creates a substantive right enforceable against the United States in money damages only if it " 'can fairly be

[6] See n. 1, *supra*.

[7] The Court of Claims did not consider the respondents' assertion that other statutes, see n. 1, *supra*, render the United States liable in money damages for the mismanagement alleged in this case. Nor did the court address the respondents' contention that the alleged mismanagement is cognizable under the Tucker Act because it involves money improperly exacted or retained. The court may, of course, consider these contentions on remand.

The respondents make two other arguments. They assert that the special relationship between the United States and Indian tribes establishes a right to money damages for timber mismanagement. They also contend that the General Allotment Act and the Treaty of Olympia, 12 Stat. 971 (1859), create trust responsibilities on the part of the United States that constitute implied contracts within the scope of the Tucker Act. Because the respondents did not raise these contentions in the Court of Claims, we will not consider them. *E. g., Adickes* v. *Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970).

interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.*, at 400, quoting *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967). The Court today holds that *Testan* bars a damages suit against the Government by Indian allottees, their Tribe, and their association for breach of fiduciary duties in the management of timber lands allotted under the General Allotment Act of 1887 (Act), 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.* Because I believe that the Act can fairly be interpreted as mandating compensation, I dissent.

The Act could hardly be more explicit as to the status of allotted lands. They are to be held by the United States *"in trust for the sole use and benefit of the Indian,"* § 5 of the Act, 24 Stat. 389, as amended, 25 U. S. C. § 348 (emphasis added). The United States has here unmistakably assumed the obligation to act as trustee of these lands with the Indian allottees as beneficiaries. The Court holds, however, that the "trust" established by § 5 is not a trust as that term is commonly understood, and that Congress had no intention of imposing full fiduciary obligations on the United States. Congress' purposes, it is said, were narrower: to impose a restraint on alienation by Indian allottees while ensuring immunity from state taxation during the period of the restraint.

I do not find this argument convincing. The language of the Act, which is the starting point for all statutory interpretation, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 210 (1979); *Teamsters* v. *Daniel*, 439 U. S. 551, 558 (1979), explicitly creates a "trust." This language would surely be a sufficient manifestation of intent to create a trust if the settlor were other than the United States. See Restatement (Second) of Trusts §§ 23, 24 (1959) (hereinafter Restatement); G. Bogert, The Law of Trusts and Trustees § 45 (2d ed. 1965) (hereinafter Bogert); 1 A. Scott, The Law of Trusts § 23 (3d ed. 1967) (hereinafter Scott). The structure

created by the Act has all the necessary elements of a common-law trust—a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (the designated allotment lands). See Restatement § 2, Comment *h*, p. 10. The United States has capacity to take and hold property in trust. *Id.*, § 95; 2 Scott § 95 (discussing the Act). And an essential distinguishing feature of any trust, at common law, was that it entailed a

> "*fiduciary relationship* with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person. . . ." Restatement § 2 (emphasis added).

See 1 Scott § 2.5. Hence, if we are to give the words of the statute their ordinary meaning, as we commonly do when the law does not define a statutory phrase precisely, *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra*, at 211, we should find that the trust established by the Act imposes fiduciary obligations on the United States as trustee.

The legislative history of the Act does not convince me that any narrower reading is required. This statute was enacted against the backdrop of a relationship between the United States and the Indian tribes that had long been considered to "resembl[e] that of a ward to his guardian." *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831); see also *Morton* v. *Mancari*, 417 U. S. 535, 541–542 (1974); *United States* v. *Mason*, 412 U. S. 391, 398 (1973); *Squire* v. *Capoeman*, 351 U. S. 1, 2 (1956); *United States* v. *Payne*, 264 U. S. 446, 448 (1924); *United States* v. *Kagama*, 118 U. S. 375, 382 (1886). When Congress established a "trust" for the Indian allottees it is not sensible to assume an intent to depart from these well-known fiduciary principles. Rather, as we noted in *Mattz* v. *Arnett*, 412 U. S. 481, 496 (1973), the policy of the Act was to "*continue* the reservation system and *the trust status of Indian lands.*" (Emphasis added.)

The Court acknowledges that the Act did create a trust relationship between the United States and the allottee. *Ante*, at 542. It holds, however, that the fiduciary obligations imposed on the United States as trustee are very narrow and do not extend to the proper management of Indian timber lands. The lands covered by the Act were mostly agricultural or grazing lands, as to which it was expected that the Indian himself would reside on and manage the allotments. Not until *United States* v. *Payne, supra*, was it established that forested lands such as those of the Quinault Reservation were subject to allotment under the Act. Hence, it is said, if the Government has fiduciary duties they are solely to ensure nonalienation and immunity from state taxation.

This argument takes too narrow a view of the fiduciary duty established by the Act and of the subsequent statutory and administrative developments which clarified and fleshed out that duty. The timberlands of the Quinault Reservation cannot, as a practical matter, be managed by the Indian allottees. In such a case, where management functions must necessarily be performed by the Government, it seems most consistent with the scheme of the Act that the United States was to assume fiduciary obligations in the performance of its management functions. Subsequent Congresses have implicitly acknowledged the existence of such obligations. See 25 U. S. C. § 466 (instructing the Secretary of the Interior to manage Indian forests on a sustained-yield basis); §§ 323–325 (authorizing the Secretary to grant rights-of-way over Indian trust lands upon payment of just compensation); § 162a (authorizing the Secretary to manage tribal funds held in trust). The Secretary has promulgated detailed regulations governing the exercise of his powers under these statutes. While I do not say that the Government's fiduciary responsibility necessarily conforms to the exact terms of these statutes and regulations, their existence at least points to the inference that as a matter of statute and administrative prac-

tice the Government has accepted *some* obligations in the management of allotted timberlands.

The remaining question is whether the Government has consented to liability in damages for the breach of these obligations. Such liability, in my view, follows naturally from the existence of a trust and of fiduciary duties. It is hornbook law that the trustee is accountable in damages for breaches of trust. See Restatement §§ 205–212; Bogert § 862; 3 Scott § 205. Moreover, it would interfere with, if not defeat, the purposes of the Act if the allottees were to be remitted to a suit for prospective, equitable relief in the protection of their rights. Absent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties, at least until the allottees managed to obtain a judicial decree against future breaches of trust. Finally, it is noteworthy that the Department of the Interior, which as the agency charged with administering the Act is entitled to considerable deference in its interpretation of the statute, *e. g.*, *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), apparently disagrees with the position taken by the Solicitor General in this litigation and believes that a money damages remedy should be permitted. See Letter from Departmental Solicitor Krulitz to Assistant Attorney General Moorman, Nov. 21, 1978, reprinted in App. to Brief for Respondents 1a–21a.

In sum, I would find that the Act creates a bona fide trust, imposes fiduciary obligations on the United States as trustee in the management of allotted timberlands, and provides a damages remedy against the United States for breach of these obligations. The Act "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States* v. *Testan*, 424 U. S., at 400, quoting *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl., at 607, 372 F. 2d, at 1009. In my view, therefore, the

Court of Claims had jurisdiction over this action as one founded on an "Act of Congress," 28 U. S. C. § 1491, and as one brought by an identifiable group of Indians and "otherwise . . . cognizable in the Court of Claims," 28 U. S. C. § 1505. Accordingly, I respectfully dissent.

# ROBERTS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78–1793. Argued January 14, 15, 1980—Decided April 15, 1980

*Held:* The District Court properly considered, as one factor in imposing consecutive sentences on petitioner who had pleaded guilty to two counts of using a telephone to facilitate the distribution of heroin, petitioner's refusal to cooperate with Government officials investigating a related criminal conspiracy to distribute heroin in which he was a confessed participant. Pp. 556–562.

(a) No misinformation of constitutional magnitude was present in this case; petitioner rebuffed repeated requests for his cooperation over a period of three years and concedes that cooperation with the authorities is a "laudable endeavor" that bears a "rational connection to a defendant's willingness to shape up and change his behavior." By declining to cooperate, petitioner rejected an obligation of community life that should be recognized before rehabilitation can begin and protected his former partners in crime, thereby preserving his ability to resume criminal activities upon release. Pp. 556–558.

(b) Nor can petitioner's failure to cooperate be justified on the basis of fears of physical retaliation and self-incrimination, or on the ground that the District Court punished him for exercising his Fifth Amendment privilege against self-incrimination. These arguments were raised for the first time in petitioner's appellate brief, neither petitioner nor his lawyer having offered any explanation to the sentencing court even though it was known that petitioner's intransigency would be used against him. Although the requirement of *Miranda* v. *Arizona*, 384 U. S. 436, of specific warnings creates a limited exception to the rule that the privilege against self-incrimination is not self-executing and must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogation for which it was designed, and here there was no custodial interrogation. Petitioner volunteered his confession at his first interview with investigators, after *Miranda* warnings had been given and at a time when he was free to leave. For the next three years until the time when he received the sentence he now challenges, neither he nor his counsel—who were both fully apprised that the extent of petitioner's cooperation could be expected to affect his sentence—ever claimed that petitioner's unwillingness to cooperate

was based upon the right to remain silent or the fear of self-incrimination. [p. 559–562.

195 U. S. App. D. C. 1, 600 F. 2d 815, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 562. MARSHALL, J., filed a dissenting opinion, *post*, p. 563.

*Allan M. Palmer* argued the cause and filed a brief for petitioner.

*Stephen M. Shapiro* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann,* and *Deputy Solicitor General Frey.**

MR. JUSTICE POWELL delivered the opinion of the Court.

The question is whether the District Court properly considered, as one factor in imposing sentence, the petitioner's refusal to cooperate with officials investigating a criminal conspiracy in which he was a confessed participant.

## I

Petitioner Winfield Roberts accompanied Cecilia Payne to the office of the United States Attorney for the District of Columbia one day in June 1975. Government surveillance previously had revealed that a green Jaguar owned by Payne was used to transport heroin within the District. Payne told investigators that she occasionally lent the Jaguar to petitioner, who was waiting outside in the hall. At Payne's suggestion, the investigators asked petitioner if he would answer some questions. Although petitioner was present voluntarily, the investigators gave him the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). They also told him that he

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**Bruce J. Ennis, Jr.*, filed a brief for the American Civil Liberties Union et al. as *amici curiae*.

was free to leave. When petitioner indicated that he would stay, the investigators asked whether he knew "Boo" Thornton, then the principal target of the heroin investigation. Petitioner admitted that he had delivered heroin to Thornton on several occasions. Confessing also that he had discussed drug transactions with Thornton in certain intercepted telephone conversations, petitioner explained the meaning of code words used in the conversations. When asked to name suppliers, however, petitioner gave evasive answers. Although the investigators warned petitioner that the extent of his cooperation would bear on the charges brought against him, he provided no further information.

Petitioner was indicted on one count of conspiring to distribute heroin, 21 U. S. C. §§ 841, 846, and four counts of using a telephone to facilitate the distribution of heroin, 21 U. S. C. § 843 (b).[1] He retained a lawyer, who rejected the Government's continued efforts to enlist petitioner's assistance. In March 1976, petitioner entered a plea of guilty to the conspiracy count and received a sentence of 4 to 15 years' imprisonment, 3 years' special parole, and a $5,000 fine. The Court of Appeals vacated the conviction on the ground that the terms of the plea agreement were inadequately disclosed to the District Court. *United States* v. *Roberts*, 187 U. S. App. D. C. 90, 570 F. 2d 999 (1977).

On remand, petitioner pleaded guilty to two counts of telephone misuse under an agreement that permitted the Government to seek a substantial sentence. The Government filed a memorandum recommending two consecutive sentences of 16 to 48 months each and a $5,000 fine.[2] The memorandum cited petitioner's previous conviction for 10 counts of bank robbery, his voluntary confession, and his subsequent

[1] Petitioner's intercepted conversations with Thornton apparently could have provided the basis for 13 counts of unlawful use of a telephone. App. 36.

[2] The maximum sentence on each count was four years' imprisonment and a $30,000 fine. 21 U. S. C. § 843 (c).

refusal to name suppliers. The memorandum also emphasized the tragic social consequences of the heroin trade. Since petitioner was not himself an addict and had no familial responsibilities, the Government theorized that he sold heroin to support his extravagant lifestyle while unemployed and on parole. The Government concluded that stern sentences were necessary to deter those who would traffic in deadly drugs for personal profit.

At the sentencing hearing, defense counsel noted that petitioner had been incarcerated for two years pending appeal and that codefendant Thornton had been sentenced to probation. Counsel argued that petitioner should receive concurrent sentences that would result in his immediate release. He directed the court's attention to petitioner's voluntary confession, explaining that petitioner had refused to identify other members of the conspiracy because he "wasn't that involved in it." App. 30. The prosecutor responded that the request for probation was "ironic" in light of petitioner's refusal to cooperate in the investigation over the course of "many, many years, knowing what he faces." *Id.*, at 36. Thus, the Government could not ask the court "to take into account some extenuating and mitigating circumstances, that the defendant has cooperated. . . ." *Ibid.* Stressing the seriousness of the offense and the absence of excuse or mitigation, the Government recommended a substantial prison term.

The District Court imposed consecutive sentences of one to four years on each count and a special parole term of three years, but it declined to impose a fine. The court explained that these sentences were appropriate because petitioner was on parole from a bank robbery conviction at the time of the offenses, and because he was a dealer who had refused to cooperate with the Government.[3] Petitioner again appealed,

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[3] Before imposing sentence, the court explained:

"Mr. Roberts, we have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which

contending for the first time that the sentencing court should not have considered his failure to cooperate. The Court of Appeals for the District of Columbia Circuit vacated the special parole term but otherwise affirmed the judgment. 195 U. S. App. D. C. 1, 600 F. 2d 815 (1979). We granted certiorari, 444 U. S. 822 (1979), and we now affirm.

## II

The principles governing criminal sentencing in the United States district courts require no extensive elaboration. Congress has directed that

> "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U. S. C. § 3577.

See also 21 U. S. C. § 850. This Court has reviewed in detail the history and philosophy of the modern conception that "the punishment should fit the offender and not merely the crime." *Williams* v. *New York*, 337 U. S. 241, 247 (1949); see *United States* v. *Grayson*, 438 U. S. 41, 45–50 (1978). Two Terms ago, we reaffirmed the "fundamental sentencing principle" that " 'a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' " *Id.*, at 50, quoting *United States* v. *Tucker*, 404 U. S. 443, 446 (1972). See also *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55 (1937). We have, however, sustained due process objections to sentences imposed on the basis of "misinformation of constitutional magnitude." *United States* v. *Tucker*, *supra*, at 447; see *Townsend* v. *Burke*, 334 U. S. 736, 740–741 (1948).

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you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government." App. 40.

No such misinformation was present in this case. The sentencing court relied upon essentially undisputed facts. There is no question that petitioner rebuffed repeated requests for his cooperation over a period of three years. Nor does petitioner contend that he was unable to provide the requested assistance. Indeed, petitioner concedes that cooperation with the authorities is a "laudable endeavor" that bears a "rational connection to a defendant's willingness to shape up and change his behavior. . . ." Brief for Petitioner 17.[4] Unless a different explanation is provided, a defendant's refusal to assist in the investigation of ongoing crimes gives rise to an inference that these laudable attitudes are lacking.

It hardly could be otherwise. Concealment of crime has been condemned throughout our history. The citizen's duty to "raise the 'hue and cry' and report felonies to the authorities," *Branzburg* v. *Hayes*, 408 U. S. 665, 696 (1972), was an established tenet of Anglo-Saxon law at least as early as the 13th century. 2 W. Holdsworth, History of English Law 101–102 (3d ed. 1927); 4 *id.*, at 521–522; see Statute of Westminster First, 3 Edw. 1, ch. 9, p. 43 (1275);

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[4] See, *e. g.*, ABA Project on Standards for Criminal Justice, Pleas of Guilty § 1.8 (a)(v) (App. Draft 1968); *id.*, at 48–49; Lumbard, Sentencing and Law Enforcement, 40 F. R. D. 406, 413–414 (1966); cf. R. Cross, The English Sentencing System 170 (2d ed. 1975).

We doubt that a principled distinction may be drawn between "enhancing" the punishment imposed upon the petitioner and denying him the "leniency" he claims would be appropriate if he had cooperated. The question for decision is simply whether petitioner's failure to cooperate is relevant to the currently understood goals of sentencing. We do note, however, that Judge MacKinnon, author of the opinion reversing petitioner's first conviction, observed on the basis of his "complete familiarity with the facts of this entire case" that the petitioner's current sentence is a "very light" one. 195 U. S. App. D. C. 1, 9, 600 F. 2d 815, 823 (1979) (separate statement on denial of rehearing en banc). The sentence of two to eight years' imprisonment certainly was not a severe penalty for a "substantial drug distributor," *ibid.*, who plied his trade while on parole from a prior conviction for bank robbery.

Statute of Westminster Second, 13 Edw. 1, chs. 1, 4, and 6, pp. 112–115 (1285). The first Congress of the United States enacted a statute imposing criminal penalties upon anyone who, "having knowledge of the actual commission of [certain felonies,] shall conceal, and not as soon as may be disclose and make known the same to [the appropriate] authority. . . ." Act of Apr. 30, 1790, § 6, 1 Stat. 113.[5] Although the term "misprision of felony" now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.

This deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination, see Part III, *infra*, the criminal defendant no less than any other citizen is obliged to assist the authorities. The petitioner, for example, was asked to expose the purveyors of heroin in his own community in exchange for a favorable disposition of his case. By declining to cooperate, petitioner rejected an "obligatio[n] of community life" that should be recognized before rehabilitation can begin. See Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 437 (1958). Moreover, petitioner's refusal to cooperate protected his former partners in crime, thereby preserving his ability to resume criminal activities upon release. Few facts available to a sentencing judge are more relevant to "'the likelihood that [a defendant] will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, [and] the degree to which he does or does not deem himself at war with his society.'" *United States* v. *Grayson*, *supra*, at 51, quoting *United States* v. *Hendrix*, 505 F. 2d 1233, 1236 (CA2 1974).

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[5] The statute, as amended, is still in effect. 18 U. S. C. § 4. It has been construed to require "both knowledge of a crime and some affirmative act of concealment or participation." See *Branzburg* v. *Hayes*, 408 U. S. 665, 696, n. 36 (1972).

## III

Petitioner does not seriously contend that disregard for the obligation to assist in a criminal investigation is irrelevant to the determination of an appropriate sentence. He rather contends that his failure to cooperate was justified by legitimate fears of physical retaliation and self-incrimination. In view of these concerns, petitioner asserts that his refusal to act as an informer has no bearing on his prospects for rehabilitation. He also believes that the District Court punished him for exercising his Fifth Amendment privilege against self-incrimination.

These arguments would have merited serious consideration if they had been presented properly to the sentencing judge. But the mere possibility of unarticulated explanations or excuses for antisocial conduct does not make that conduct irrelevant to the sentencing decision. The District Court had no opportunity to consider the theories that petitioner now advances, for each was raised for the first time in petitioner's appellate brief. Although petitioner knew that his intransigency would be used against him, neither he nor his lawyer offered any explanation to the sentencing court. Even after the prosecutor observed that the failure to cooperate could be viewed as evidence of continuing criminal intent, petitioner remained silent.

Petitioner insists that he had a constitutional right to remain silent and that no adverse inferences can be drawn from the exercise of that right. We find this argument singularly unpersuasive. The Fifth Amendment privilege against compelled self-incrimination is not self-executing. At least where the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion. *Garner* v. *United States*, 424 U. S. 648, 653–655 (1976); *United States* v. *Kordel*, 397 U. S. 1, 7–10 (1970); see *United States* v. *Mandujano*, 425 U. S. 564, 574–575 (1976)

(opinion of BURGER, C. J.); *id.*, at 591–594 (BRENNAN, J., concurring in judgment).[6]

In this case, as in *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113 (1927), petitioner "did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought." The Court added in *Vajtauer* that the privilege "must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it." *Ibid.* Thus, if petitioner believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined whether his claim was legitimate.[7]

Petitioner would avoid the force of this elementary rule by arguing that *Miranda* warnings supplied additional protection for his right to remain silent. But the right to silence described in those warnings derives from the Fifth Amendment and adds nothing to it. Although *Miranda*'s requirement of specific warnings creates a limited exception to the rule that the privilege must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogations for which it was designed. The warnings protect persons who, exposed to such interrogation without the assistance of counsel, otherwise might be unable

[6] The Court recognized in *Garner* v. *United States*, 424 U. S., at 656–657, that this rule is subject to exception when some coercive factor prevents an individual from claiming the privilege or impairs his choice to remain silent. No such factor has been identified in this case. See *infra*, at 561.

[7] See *Garner* v. *United States*, *supra*, at 658, n. 11; *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Mason* v. *United States*, 244 U. S 362, 364–366 (1917); *United States* v. *Vermeulen*, 436 F. 2d 72, 76–77 (CA2 1970), cert. denied, 402 U. S. 911 (1971). It is the duty of a court to determine the legitimacy of a witness' reliance upon the Fifth Amendment. *Rogers* v. *United States*, 340 U. S. 367, 374–375 (1951). A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give.

to make a free and informed choice to remain silent. *Miranda* v. *Arizona*, 384 U. S., at 475–476; see *Garner* v. *United States*, *supra*, at 657.[8]

There was no custodial interrogation in this case. Petitioner volunteered his confession at his first interview with investigators in 1975, after *Miranda* warnings had been given and at a time when he was free to leave. He does not claim that he was coerced.[9] Thereafter, petitioner was represented by counsel who was fully apprised—as was petitioner—that the extent of petitioner's cooperation could be expected to affect his sentence. Petitioner did not receive the sentence he now challenges until 1978. During this entire period, neither petitioner nor his lawyer ever claimed that petitioner's unwillingness to provide information vital to law enforcement was based upon the right to remain silent or the fear of self-incrimination.

Petitioner has identified nothing that might have impaired his " 'free choice to admit, to deny, or to refuse to answer.' " *Garner* v. *United States*, *supra*, at 657, quoting *Lisenba* v. *California*, 314 U. S. 219, 241 (1941). His conduct bears no resemblance to the "insolubly ambiguous" postarrest silence that may be induced by the assurances contained in *Miranda* warnings. Cf. *Doyle* v. *Ohio*, 426 U. S. 610, 617–618 (1976). We conclude that the District Court committed no constitutional error. If we were to invalidate petitioner's sentence on the record before us, we would sanction an unwarranted interference with a function traditionally vested in the trial courts. See *Dorszynski* v. *United States*, 418 U. S. 424, 440–441

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[8] In *United States* v. *Washington*, 431 U. S. 181, 187, n. 5 (1977), the Court explained that "[a]ll *Miranda*'s safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody."

[9] The District Court found that petitioner freely waived his *Miranda* rights when he first confessed his involvement in the conspiracy. Tr. 40 (Oct. 17, 1975); see App. 16, n. 4.

(1974).[10] Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion.

The principal divisive issue in this case is whether petitioner's silence should have been understood to imply continued solicitude for his former criminal enterprise, rather than assertion of the Fifth Amendment right against self-incrimination or fear of retaliation. I agree with the Court that the trial judge cannot be faulted for drawing a negative inference from petitioner's noncooperation when petitioner failed to suggest that other, neutral, inferences were available. And because the Government questioning to which he failed to respond was not directed at incriminating him, petitioner may not stand upon a Fifth Amendment privilege that he never invoked at the time of his silence. See *United States* v. *Mandujano*, 425 U. S. 564, 589–594 (1976) (BRENNAN, J., concurring in judgment); *Garner* v. *United States*, 424 U. S. 648, 655–661 (1976); *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113 (1927).*

[10] The dissenting opinion asserts that the record reflects an "improper involvement of the judicial office in the prosecutorial function." *Post*, at 567. We find no basis for this contention. The District Court did not participate in the plea-bargaining process; it merely undertook a retrospective review of petitioner's character, record, and criminal conduct in accordance with applicable law. 18 U. S. C. § 3577; Fed. Rule Crim. Proc. 32 (c). And a defendant who failed even to raise the possibility of self-incrimination or retaliation over a course of three years is hardly in a position to complain that he was "put to an unfair choice." *Post*, at 568.

*When the Government actually seeks to incriminate the subject of questioning, failure to invoke the Fifth Amendment privilege is reviewed under the stringent "knowing and completely voluntary waiver" standard. *United States* v. *Mandujano*, 425 U. S., at 593 (BRENNAN, J., concurring in judgment). But when it is only the subject who is reasonably aware of the incriminating tendency of the questions, it is his responsibility to

Nevertheless, the problem of drawing inferences from an ambiguous silence is troubling. As a matter of due process, an offender may not be sentenced on the basis of mistaken facts or unfounded assumptions. *Townsend* v. *Burke*, 334 U. S. 736, 740–741 (1948); see *United States* v. *Grayson*, 438 U. S. 41, 55 (1978) (STEWART, J., dissenting) (collateral inquiry may be required before sentence is enhanced because of trial judge's unreviewable impression that defendant perjured himself at trial). It is of comparable importance to assure that a defendant is not penalized on the basis of groundless inferences. At the least, sentencing judges should conduct an inquiry into the circumstances of silence where a defendant indicates before sentencing that his refusal to cooperate is prompted by constitutionally protected, or morally defensible, motives. Furthermore, especially where conviction is based upon a guilty plea, it may be advisable for trial judges to raise the question of motive themselves when presented with a prosecutorial recommendation for severity due to an offender's noncooperation. During the Rule 32 allocution before sentencing, Fed. Rule Crim. Proc. 32 (a)(1), the defendant could be asked on the record whether he has a reasonable explanation for his silence; if a justification were proffered, the judge would then proceed to determine its veracity and reasonableness. Such an allocution procedure would reduce the danger of erroneous inference and provide a record to support sentencing against subsequent challenge. Cf. *McCarthy* v. *United States*, 394 U. S. 459, 466–467 (1969) (Fed. Rule Crim. Proc. 11 allocution procedure).

MR. JUSTICE MARSHALL, dissenting.

The Court today permits a term of imprisonment to be increased because of a defendant's refusal to identify others

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put the Government on notice by formally availing himself of the privilege. *Id.*, at 589–594; *Garner* v. *United States*, 424 U. S., at 655. At that point, the Government may either cease questioning or continue under a grant of immunity.

involved in criminal activities—a refusal that was not unlawful and that may have been motivated by a desire to avoid self-incrimination or by a reasonable fear of reprisal. I do not believe that a defendant's failure to inform on others may properly be used to aggravate a sentence of imprisonment, and accordingly, I dissent.

The majority does not dispute that a failure to disclose the identity of others involved in criminal activity may often stem from a desire to avoid self-incrimination. This case is an excellent illustration of that possibility. The prosecutor asked petitioner "to identify the person or persons from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them." App. 36. Disclosure of this information might well have exposed petitioner to prosecution on additional charges.[1] He was never offered immunity from such prosecution. Petitioner's right to refuse to incriminate himself on additional charges was not, of course, extinguished by his guilty plea.

There can be no doubt that a judge would be barred from increasing the length of a jail sentence because of a defendant's refusal to cooperate based on the constitutional privilege against self-incrimination. In such a case, the threat of a longer sentence of imprisonment would plainly be compulsion within the meaning of the Fifth Amendment. Cf. *McGautha* v. *California*, 402 U. S. 183 (1971). Such an aggravation of sentence would amount to an impermissible penalty imposed solely because of the defendant's assertion of the Fifth Amendment privilege.

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[1] The prosecutor stated at the sentencing hearing that the Government's initial offer of leniency in exchange for petitioner's cooperation was made on the assumption that he was a relatively minor figure in the conspiracy. The Government argued for lengthy consecutive sentences, however, because "we were shown to be wrong" about that assumption. It seems plain that if petitioner had provided the information requested, he would have incriminated himself on additional charges.

I also believe that it would be an abuse of discretion for a judge to use a defendant's refusal to become an informer to increase the length of a sentence when the refusal was motivated by a fear of retaliation.[2] In such a case, the failure to identify other participants in the crime is irrevelant to the defendant's prospects for rehabilitation, see *ante*, at 558, and bears no relation to any of the legitimate purposes of sentencing. See *United States* v. *Grayson*, 438 U. S. 41 (1978); *United States* v. *Tucker*, 404 U. S. 443 (1972).

In this case, then, petitioner's refusal to provide the requested information was lawful[3] and may have been motivated by the possibility of self-incrimination or a reasonable fear of reprisal. The majority acknowledges that these claims "would have merited serious consideration if they had been presented properly to the sentencing judge." *Ante*, at 559. Because petitioner did not expressly state these grounds to

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[2] In determining whether a refusal to cooperate can be taken into consideration when based on a fear of reprisal, the relevant inquiry, of course, is whether the defendant in fact has a subjective fear, not whether the fear is objectively reasonable. It is when the defendant is actually afraid of reprisal that his failure to cooperate has no relevance to the legitimate purpose of sentencing.

[3] The Court refers to the ancient offense of misprision of felony, *ante*, at 557–558, but, as its own discussion shows, petitioner could not have been punished under 18 U. S. C. § 4. See *ante*, at 558, n. 5. The Government has never contended that petitioner's behavior was other than lawful. A discussion of the continued vitality of laws making it a crime to fail to report criminal behavior is unnecessary to this case; I observe only that such laws have fallen into virtually complete disuse, a development that reflects a deeply rooted social perception that the general citizenry should not be forced to participate in the enterprise of crime detection. See Note, 27 Hastings L. J. 175, 181–187 (1975); Note, 23 Emory L. J. 1095 (1974). Cf. Glazebrook, Misprision of Felony—Shadow or Phantom?, 8 Am. J. Legal Hist. 189, 283 (1964). As Mr. Chief Justice Marshall stated: "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man." *Marbury* v. *Brooks*, 7 Wheat. 556, 575–576 (1822).

the sentencing judge, however, the Court indulges the assumption that petitioner's refusal was motivated by a desire to "preserv[e] his ability to resume criminal activities upon release." *Ante*, at 558. I am at a loss to discern any evidentiary basis for this assumption.[4] And I reject the Court's harsh and rigid approach to the issue of waiver, especially in a context in which it was hardly clear that reasons for petitioner's failure to cooperate had to be identified before the sentencing judge.[5]

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[4] Indeed, the record hardly supports the Court's characterization of petitioner's behavior as "intransigency." *Ante*, at 559. Except for his refusal to identify additional participants, petitioner was quite helpful. He voluntarily accompanied Ms. Payne to the office of the United States Attorney. At that time, as the Government conceded at the sentencing hearing, "we had no idea of the identity of who it was who was using that green Jaguar automobile to ferry narcotics about the city." App. 35. Ms. Payne said she lent the car to petitioner, and he agreed to be interviewed. At that initial interview, he confessed, implicated a co-conspirator, and voluntarily explained the meaning of code words used in the conspiracy.

The Court also relies on Judge MacKinnon's assertion that the sentence was "very light" for a "substantial drug distributor." *Ante*, at 557, n. 4. Of course, petitioner did not plead guilty to conspiracy or to distribution of heroin, but to two counts of unlawful use of a telephone to facilitate the distribution of heroin. Each count was punishable by a maximum of four years' imprisonment and a $30,000 fine, and petitioner was sentenced to consecutive 1- to 4-year terms. At the sentencing hearing, petitioner's counsel stated that he had been unable to find a single case "in which any federal judge has ever given consecutive sentences for two or more phone counts." App. 28. The Government has never challenged this assertion.

[5] The sentencing hearing took place on April 21, 1978. At that time, there was no settled law on the question whether failure to cooperate could be considered as an aggravating factor in sentencing. Compare *United States* v. *Garcia*, 544 F. 2d 681, 684–686 (CA3 1976) (improper factor), and *United States* v. *Rogers*, 504 F. 2d 1079 (CA5 1974) (same), with *United States* v. *Chaidez-Castro*, 430 F. 2d 766 (CA7 1970) (proper factor). Nor was there any rule that a defendant was required to identify reasons for his failure to cooperate. For the Court to hold in these circumstances that the defendant's silence amounted to "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v.

Furthermore, the bare failure to cooperate in an investigation of others cannot, without further inquiry, justify a conclusive negative inference about "the meaning of that conduct with respect to [the defendant's] prospects for rehabilitation and restoration to a useful place in society." *United States* v. *Grayson*, *supra*, at 55. A fear of reprisal against one's self or one's family or a desire to avoid further self-incrimination are equally plausible explanations for such conduct. Even the desire to "do his own time" without becoming a police informer might explain petitioner's behavior without necessarily indicating that he intended to "resume criminal activities upon [his] release." *Ante*, at 558. The inference that petitioner was a poor candidate for rehabilitation could not be justified without additional information.[6]

The enhancement of petitioner's sentence, then, was impermissible because it may have burdened petitioner's exercise of his constitutional rights or been based on a factor unrelated to the permissible goals of sentencing. In addition, it represented an improper involvement of the judicial office in the prosecutorial function that should be corrected through our supervisory power over the federal courts.[7]

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*Zerbst*, 304 U. S. 458, 464 (1938), seems to me extraordinarily stern in light of the Court's traditional indulgence of " 'every reasonable presumption against waiver' of fundamental constitutional rights." *Ibid.* (citation omitted).

[6] In this respect, petitioner's conduct was quite different from the deliberate perjury involved in *United States* v. *Grayson*, 438 U. S. 41 (1978). Perjury is itself a serious crime, a " 'manipulative defiance of the law,' " *id.*, at 51, quoting *United States* v. *Hendrix*, 505 F. 2d 1233, 1236 (CA2 1974), that corrupts the trial process.

[7] As the Court notes, 18 U. S. C. § 3577 provides that "[n]o limitation shall be placed on the information . . . which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." This statute, however, was merely a codification of the sentencing standards set forth in *Williams* v. *New York*, 337 U. S. 241 (1949). Nothing in the statute or its legislative history suggests a congressional intention to overturn or limit this Court's historic powers of supervision

The usual method for obtaining testimony which may be self-incriminatory is through a grant of immunity from prosecution. See 18 U. S. C. § 6001 *et seq.* (1976 ed. and Supp. II). Prosecutors would have little incentive to offer defendants immunity for their testimony if they could achieve the same result without giving up the option to prosecute. There is no suggestion here that an offer of immunity was ever extended to petitioner. If a defendant knows his silence may be used against him to enhance his sentence, he may be put to an unfair choice. He must either give incriminating information with no assurance that he will not be prosecuted on the basis of that information, or face the possibility of an increased sentence because of his noncooperation. Since a prosecutor may overcome a Fifth Amendment claim through an offer of immunity, I see no reason to put defendants to such a choice.

A second method available to the prosecutor for obtaining a defendant's testimony against others is the plea-bargaining process. The Court has upheld that process on the theory that the relative equality of bargaining power between the prosecutor and the defendant prevents the process from being fundamentally unfair. *Santobello* v. *New York*, 404 U. S. 257, 261 (1971). But if the judge can be counted on to increase the defendant's sentence if he fails to cooperate, the balance of bargaining power is tipped in favor of the prosecution. Not only is the prosecutor able to offer less in exchange for cooperation, but a defendant may agree for fear of incurring the displeasure of the sentencing judge. To insure that defendants will not be so intimidated into accepting plea bar-

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over the conduct of criminal cases in the federal courts. See *Mesarosh* v. *United States*, 352 U. S. 1, 14 (1956). There is no warrant for the conclusion that 18 U. S. C. § 3577, which was designed to codify existing judicial practices, operates as a bar to the use of those supervisory powers to safeguard the Fifth Amendment privilege or to protect against irrational sentencing.

gains, federal judges are forbidden from participating in the bargaining process. See Fed. Rule Crim. Proc. 11 (e)(1); ABA Project on Standards for Criminal Justice, Pleas of Guilty § 3.3 (a) (App. Draft 1968). As Judge Bazelon observed below: "The trial judge, whose impartiality is a cornerstone of our criminal justice system, may be tempted, under the guise of exercising discretion in sentencing[,] to join forces with the prosecutor in securing the defendant's cooperation." 195 U. S. App. D. C. 1, 3, 600 F. 2d 815, 817 (1979). I do not believe that we should allow that possibility.

I find disturbing the majority's willingness to brush aside these serious objections to the propriety of petitioner's sentence on the strength of "the duty to report known criminal behavior," *ante*, at 558. According to the Court, petitioner's refusal to become an informer was a rejection of a "deeply rooted social obligation," *ibid.* All citizens apparently are "obliged to assist the authorities" in this way, and petitioner's failure to do so was not only "a badge of irresponsible citizenship," but constituted "antisocial conduct" as well. *Ante*, at 558, 559.

The Court supports its stern conclusions about petitioner's civic duty only by reference to the concepts of "hue and cry" and "misprision of felony." Those concepts were developed in an era in which enforcement of the criminal law was entrusted to the general citizenry rather than to an organized police force.[8] But it is unnecessary to discuss in detail the historical context of such concepts, so different from our present-day society, in order to reject the Court's analysis. American society has always approved those who own up to their wrongdoing and vow to do better, just as it has admired those who come to the aid of the victims of criminal conduct. But our admiration of those who inform on others

[8] Cf. F. Pollock & F. Maitland, The History of English Law 582–583 (2d ed. 1909).

has never been as unambiguous as the majority suggests. The countervailing social values of loyalty and personal privacy have prevented us from imposing on the citizenry at large a duty to join in the business of crime detection. If the Court's view of social mores were accurate, it would be hard to understand how terms such as "stool pigeon," "snitch," "squealer," and "tattletale" have come to be the common description of those who engage in such behavior.

I do not, of course, suggest that those who have engaged in criminal activity should refuse to cooperate with the authorities. The informer plays a vital role in the struggle to check crime, especially the narcotics trade. We could not do without him. In recognition of this role, it is fully appropriate to encourage such behavior by offering leniency in exchange for "cooperation." [9] Cooperation of that sort may

[9] The majority expresses "doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he cooperated." *Ante*, at 557, n. 4. But as Judge Lumbard has stated: "It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense." *United States* v. *Ramos*, 572 F. 2d 360, 363, n. 2 (CA2 1978) (concurring opinion). At the most, the distinction may be difficult to administer; it is certainly a principled one, appearing in similar form in several areas of the law. For example, a distinction has been recognized between extending leniency to a defendant who pleads guilty and augmenting the sentence of a defendant who elects to stand trial. See, *e. g.*, *United States* v. *Araujo*, 539 F. 2d 287 (CA2 1976); *United States* v. *Derrick*, 519 F. 2d 1 (CA6 1975); *United States* v. *Stockwell*, 472 F. 2d 1186 (CA9 1973); *United States* v. *Thompson*, 476 F. 2d 1196, 1201 (CA7 1973); *Scott* v. *United States*, 135 U. S. App. D. C. 377, 419 F. 2d 264 (1969). Writing for the Court, MR. JUSTICE POWELL relied in *Maher* v. *Roe*, 432 U. S. 464, 475–477 (1977), on a closely analogous distinction "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." (In certain circumstances, of course, "state encouragement of an alternative activity" may also be constitutionally impermissible. See *id.*, at 482–490

be a sign of repentance and the beginning of rehabilitation.[10] But our Government has allowed its citizens to decide for themselves whether to enlist in the enterprise of enforcing the criminal laws; it has never imposed a duty to do so, as the Court's opinion suggests. I find no justification for creating such a duty in this case and applying it only to persons about to be sentenced for a crime.

In fact, the notion that citizens may be compelled to become informers is contrary to my understanding of the fundamental nature of our criminal law. Some legal systems have been premised on the obligation of an accused to answer all questions put to him. In other societies law-abiding behavior is encouraged by penalizing citizens who fail to spy on their neighbors or report infractions. Our country, thankfully, has never chosen that path. As highly as we value the directives

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(BRENNAN, J., dissenting); *id.*, at 454–462 (MARSHALL, J., dissenting). In this case, however, it is agreed that no constitutional objection would be raised by an offer of leniency made to induce cooperation on the part of a defendant.)

[10] Petitioner agrees that the extent of a defendant's cooperation with prosecuting authorities may be taken into account in granting leniency. Cooperation, like confession, may be relevant to whether the defendant has taken an initial step toward rehabilitation. The corollary inference, however, that failure to inform on others means that rehabilitation is unlikely, does not necessarily follow. As the United States Court of Appeals for the Second Circuit has explained in a similar setting:

"[W]hile it is true that a defendant's lack of desire for rehabilitation may properly be considered in imposing sentence, to permit the sentencing judge to infer such lack of desire from a defendant's refusal to provide testimony would leave little force to the rule that a defendant may not be punished for exercising his right to remain silent. Moreover, we question how much a refusal to testify indicates an absence of rehabilitative desire, given that defendants often provide such testimony simply to get back at their former associates or to obtain a better deal from the Government. In any event, refusal to testify, particularly in narcotics cases, is more likely to be the result of well-founded fears of reprisal to the witness or his family." *DiGiovanni* v. *United States*, 596 F. 2d 74, 75 (1979).

of our criminal laws, we place their enforcement in the hands of public officers, and we do not give those officers the authority to impress the citizenry into the prosecutorial enterprise. By today's decision, the Court ignores this precept, and it does so in a setting that both threatens Fifth Amendment rights and encourages arbitrary and irrational sentencing.

# PAYTON *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 78–5420. Argued March 26, 1979—Reargued October 9, 1979—Decided April 15, 1980*

These appeals challenge the constitutionality of New York statutes authorizing police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. In each of the appeals, police officers, acting with probable cause but without warrants, had gone to the appellant's residence to arrest the appellant on a felony charge and had entered the premises without the consent of any occupant. In each case, the New York trial judge held that the warrantless entry was authorized by New York statutes and refused to suppress evidence that was seized upon the entry. Treating both cases as involving routine arrests in which there was ample time to obtain a warrant, the New York Court of Appeals, in a single opinion, ultimately affirmed the convictions of both appellants.

*Held:* The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. Pp. 583–603.

(a) The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant, in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. Pp. 583–590.

(b) The reasons for upholding warrantless arrests in a public place, cf. *United States* v. *Watson*, 423 U. S. 411, do not apply to warrantless invasions of the privacy of the home. The common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places; the weight of authority as it appeared to the Framers of the

*Together with No. 78–5421, *Riddick* v. *New York*, also on appeal from the same court.

Fourth Amendment was to the effect that a warrant was required for a home arrest, or at the minimum that there were substantial risks in proceeding without one. Although a majority of the States that have taken a position on the question permit warrantless home arrests even in the absence of exigent circumstances, there is an obvious declining trend, and there is by no means the kind of virtual unanimity on this question that was present in *United States* v. *Watson*, *supra*, with regard to warrantless public arrests. And, unlike the situation in *Watson*, no federal statutes have been cited to indicate any congressional determination that warrantless entries into the home are "reasonable." Pp. 590–601.

(c) For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. Pp. 602–603.

45 N. Y. 2d 300, 380 N. E. 2d 224, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 603. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 603. REHNQUIST, J., filed a dissenting opinion, *post*, p. 620.

*William E. Hellerstein* reargued the cause for appellants in both cases. With him on the briefs was *David A. Lewis*.

*Peter L. Zimroth* reargued the cause for appellee in both cases. With him on the briefs were *John J. Santucci*, *Henry J. Steinglass*, *Brian Rosner*, and *Vivian Berger*.

MR. JUSTICE STEVENS delivered the opinion of the Court.

These appeals challenge the constitutionality of New York statutes that authorize police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest.

The important constitutional question presented by this challenge has been expressly left open in a number of our prior opinions. In *United States* v. *Watson*, 423 U. S. 411, we upheld a warrantless "midday public arrest," expressly noting that the case did not pose "the still unsettled ques-

tion . . . 'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest.'" *Id.*, at 418, n. 6.[1] The question has been answered in different ways by other appellate courts. The Supreme Court of Florida rejected the constitutional attack,[2] as did the New York Court of Appeals in this case. The courts of last resort in 10 other States, however, have held that unless special circumstances are present, warrantless arrests in the home are unconstitutional.[3] Of the seven United States Courts of Appeals that have considered the question, five have expressed the opinion that such arrests are unconstitutional.[4]

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[1] See also *United States* v. *Watson*, 423 U. S., at 433 (STEWART, J., concurring); *id.*, at 432–433 (POWELL, J., concurring); *Gerstein* v. *Pugh*, 420 U. S. 103, 113, n. 13; *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474–481; *Jones* v. *United States*, 357 U. S. 493, 499–500. Cf. *United States* v. *Santana*, 427 U. S. 38.

[2] See *State* v. *Perez*, 277 So. 2d 778 (1973), cert. denied, 414 U. S. 1064.

[3] See *State* v. *Cook*, 115 Ariz. 188, 564 P. 2d 877 (1977) (resting on both state and federal constitutional provisions); *People* v. *Ramey*, 16 Cal. 3d 263, 545 P. 2d 1333 (1976), cert. denied, 429 U. S. 929 (state and federal); *People* v. *Moreno*, 176 Colo. 488, 491 P. 2d 575 (1971) (federal only); *State* v. *Jones*, 274 N. W. 2d 273 (Iowa 1979) (state and federal); *State* v. *Platten*, 225 Kan. 764, 594 P. 2d 201 (1979) (state and federal); *Commonwealth* v. *Forde*, 367 Mass. 798, 329 N. E. 2d 717 (1975) (federal only); *State* v. *Olson*, 287 Ore. 157, 598 P. 2d 670 (1979) (state and federal); *Commonwealth* v. *Williams*, 483 Pa. 293, 396 A. 2d 1177 (1978) (federal only); *State* v. *McNeal*, 251 S. E. 2d 484 (W. Va. 1978) (state and federal); *Laasch* v. *State*, 84 Wis. 2d 587, 267 N. W. 2d 278 (1978) (state and federal).

[4] Compare *United States* v. *Reed*, 572 F. 2d 412 (CA2 1978), cert. denied *sub nom. Goldsmith* v. *United States*, 439 U. S. 913; *United States* v. *Killebrew*, 560 F. 2d 729 (CA6 1977); *United States* v. *Shye*, 492 F. 2d 886 (CA6 1974); *United States* v. *Houle*, 603 F. 2d 1297 (CA8 1979); *United States* v. *Prescott*, 581 F. 2d 1343 (CA9 1978); *Dorman* v. *United States*, 140 U. S. App. D. C. 313, 435 F. 2d 385 (1970), with *United States* v. *Williams*, 573 F. 2d 348 (CA5 1978); *United States ex rel. Wright* v. *Woods*, 432 F. 2d 1143 (CA7 1970), cert. denied, 401 U. S. 966. Three other Circuits have assumed without deciding that warrant-

Last Term we noted probable jurisdiction of these appeals in order to address that question. 439 U. S. 1044. After hearing oral argument, we set the case for reargument this Term. 441 U. S. 930. We now reverse the New York Court of Appeals and hold that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643; *Wolf* v. *Colorado*, 338 U. S. 25, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

We first state the facts of both cases in some detail and put to one side certain related questions that are not presented by these records. We then explain why the New York statutes are not consistent with the Fourth Amendment and why the reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home.

## I

On January 14, 1970, after two days of intensive investigation, New York detectives had assembled evidence sufficient to establish probable cause to believe that Theodore Payton had murdered the manager of a gas station two days earlier. At about 7:30 a. m. on January 15, six officers went to Payton's apartment in the Bronx, intending to arrest him. They had not obtained a warrant. Although light and music emanated from the apartment, there was no response to their knock on the metal door. They summoned emergency assistance and, about 30 minutes later, used crowbars to break open the door and enter the apartment. No one was there. In plain view, however, was a .30-caliber shell casing that was

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less home arrests are unconstitutional. *United States* v. *Bradley*, 455 F. 2d 1181 (CA1 1972); *United States* v. *Davis*, 461 F. 2d 1026 (CA3 1972); *Vance* v. *North Carolina*, 432 F. 2d 984 (CA4 1970). And one Circuit has upheld such an arrest without discussing the constitutional issue. *Michael* v. *United States*, 393 F. 2d 22 (CA10 1968).

seized and later admitted into evidence at Payton's murder trial.[5]

In due course Payton surrendered to the police, was indicted for murder, and moved to suppress the evidence taken from his apartment. The trial judge held that the warrantless and forcible entry was authorized by the New York Code of Criminal Procedure,[6] and that the evidence in plain view was properly seized. He found that exigent circumstances justified the officers' failure to announce their purpose before entering the apartment as required by the statute.[7] He had no

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[5] A thorough search of the apartment resulted in the seizure of additional evidence tending to prove Payton's guilt, but the prosecutor stipulated that the officers' warrantless search of the apartment was illegal and that all the seized evidence except the shell casing should be suppressed. "MR. JACOBS: There's no question that the evidence that was found in bureau drawers and in the closet was illegally obtained. I'm perfectly willing to concede that, and I do so in my memorandum of law. There's no question about that." App. 4.

[6] "At the time in question, January 15, 1970, the law applicable to the police conduct related above was governed by the Code of Criminal Procedure. Section 177 of the Code of Criminal Procedure as applicable to this case recited: 'A peace officer may, without a warrant, arrest a person . . . 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.' Section 178 of the Code of Criminal Procedure provided: 'To make an arrest, as provided in the last section [177], the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.'" 84 Misc. 2d 973, 974–975, 376 N. Y. S. 2d 779, 780 (Sup. Ct., Trial Term, N. Y. County, 1974).

[7] "Although Detective Malfer knocked on the defendant's door, it is not established that at this time he announced that his purpose was to arrest the defendant. Such a declaration of purpose is unnecessary when exigent circumstances are present (*People* v. *Wojciechowski*, 31 AD 2d 658; *People* v. *McIlwain*, 28 AD 2d 711).

"'Case law has made exceptions from the statute or common-law rules for exigent circumstances which may allow dispensation with the notice . . . It has also been held or suggested that notice is not required if there is reason to believe that it will allow an escape or increase unreasonably the

occasion, however, to decide whether those circumstances also would have justified the failure to obtain a warrant, because he concluded that the warrantless entry was adequately supported by the statute without regard to the circumstances. The Appellate Division, First Department, summarily affirmed.[8]

On March 14, 1974, Obie Riddick was arrested for the commission of two armed robberies that had occurred in 1971. He had been identified by the victims in June 1973, and in January 1974 the police had learned his address. They did not obtain a warrant for his arrest. At about noon on March 14, a detective, accompanied by three other officers, knocked on the door of the Queens house where Riddick was living. When his young son opened the door, they could see Riddick sitting in bed covered by a sheet. They entered the house and placed him under arrest. Before permitting him to dress, they opened a chest of drawers two feet from the bed in search of weapons and found narcotics and related paraphernalia. Riddick was subsequently indicted on narcotics charges. At a suppression hearing, the trial judge held that the warrantless entry into his home was authorized by the revised New York statute,[9] and that the search of the imme-

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physical risk to the police or to innocent persons.' (*People* v. *Floyd*, 26 NY 2d 558, 562.)

"The facts of this matter indicate that a grave offense had been committed; that the suspect was reasonably believed to be armed and could be a danger to the community; that a clear showing of probable cause existed and that there was strong reason to believe that the suspect was in the premises being entered and that he would escape if not swiftly apprehended. From this fact the court finds that exigent circumstances existed to justify noncompliance with section 178. The court holds, therefore, that the entry into defendant's apartment was valid." *Id.*, at 975, 376 N. Y. S. 2d, at 780–781.

[8] 55 App. Div. 2d 859 (1976).

[9] New York Crim. Proc. Law § 140.15 (4) (McKinney 1971) provides, with respect to arrest without a warrant:

"In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same

diate area was reasonable under *Chimel* v. *California*, 395 U. S. 752.[10] The Appellate Division, Second Department, affirmed the denial of the suppression motion.[11]

The New York Court of Appeals, in a single opinion, affirmed the convictions of both Payton and Riddick. 45 N. Y. 2d 300, 380 N. E. 2d 224 (1978). The court recognized that the question whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest had not been settled either by that court or by this Court.[12] In answering that question, the majority of four judges relied primarily on its perception that there is a

> ". . . substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for the purpose of

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circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest."

Section 120.80, governing execution of arrest warrants, provides in relevant part:

"4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

"(a) Result in the defendant escaping or attempting to escape; or

"(b) Endanger the life or safety of the officer or another person; or

"(c) Result in the destruction, damaging or secretion of material evidence.

"5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary."

[10] App. 63–66.

[11] 56 App. Div. 2d 937, 392 N. Y. S. 2d 848 (1977). One justice dissented on the ground that the officers' failure to announce their authority and purpose before entering the house made the arrest illegal as a matter of state law.

[12] 45 N. Y. 2d, at 309–310, 380 N. E. 2d, at 228.

making an arrest, and [a] significant difference in the governmental interest in achieving the objective of the intrusion in the two instances." *Id.*, at 310, 380 N. E. 2d, at 228–229.[13]

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[13] The majority continued:

"In the case of the search, unless appropriately limited by the terms of a warrant, the incursion on the householder's domain normally will be both more extensive and more intensive and the resulting invasion of his privacy of greater magnitude than what might be expected to occur on an entry made for the purpose of effecting his arrest. A search by its nature contemplates a possibly thorough rummaging through possessions, with concurrent upheaval of the owner's chosen or random placement of goods and articles and disclosure to the searchers of a myriad of personal items and details which he would expect to be free from scrutiny by uninvited eyes. The householder by the entry and search of his residence is stripped bare, in greater or lesser degree, of the privacy which normally surrounds him in his daily living, and, if he should be absent, to an extent of which he will be unaware.

"Entry for the purpose of arrest may be expected to be quite different. While the taking into custody of the person of the householder is unquestionably of grave import, there is no accompanying prying into the area of expected privacy attending his possessions and affairs. That personal seizure alone does not require a warrant was established by *United States* v. *Watson* (423 US 411, *supra*), which upheld a warrantless arrest made in a public place. In view of the minimal intrusion on the elements of privacy of the home which results from entry on the premises for making an arrest (as compared with the gross intrusion which attends the arrest itself), we perceive no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence. To the extent that an arrest will always be distasteful or offensive, there is little reason to assume that arrest within the home is any more so than arrest in a public place; on the contrary, it may well be that because of the added exposure the latter may be more objectionable.

"At least as important, and perhaps even more so, in concluding that entries to make arrests are not 'unreasonable'—the substantive test under the constitutional proscriptions—is the objective for which they are made, viz., the arrest of one reasonably believed to have committed a felony, with resultant protection to the community. The 'reasonableness' of any governmental intrusion is to be judged from two perspectives—that of the defendant, considering the degree and scope of the invasion of his

The majority supported its holding by noting the "apparent historical acceptance" of warrantless entries to make felony arrests, both in the English common law and in the practice of many American States.[14]

Three members of the New York Court of Appeals dissented on this issue because they believed that the Constitution requires the police to obtain a "warrant to enter a home in order to arrest or seize a person, unless there are exigent circumstances." [15] Starting from the premise that, except in carefully circumscribed instances, "the Fourth Amendment forbids police entry into a private home to search for and seize an object without a warrant," [16] the dissenters reasoned that an arrest of the person involves an even greater invasion of privacy and should therefore be attended with at least as

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person or property; that of the People, weighing the objective and imperative of governmental action. The community's interest in the apprehension of criminal suspects is of a higher order than is its concern for the recovery of contraband or evidence; normally the hazards created by the failure to apprehend far exceed the risks which may follow nonrecovery." *Id.*, at 310–311, 380 N. E. 2d, at 229.

[14] "The apparent historical acceptance in the English common law of warrantless entries to make felony arrests (2 Hale, Historia Placitorum Coronae, History of Pleas of Crown [1st Amer ed, 1847], p. 92; Chitty, Criminal Law [3d Amer, from 2d London, ed, 1836] 22–23), and the existence of statutory authority for such entries in this State since the enactment of the Code of Criminal Procedure in 1881 argue against a holding of unconstitutionality and substantiate the reasonableness of such procedure. . . .

"Nor do we ignore the fact that a number of jurisdictions other than our own have also enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purposes of arrest. The American Law Institute's Model Code of Pre-Arraignment Procedure makes similar provision in section 120.6, with suggested special restrictions only as to nighttime entries." *Id.*, at 311–312, 380 N. E. 2d, at 229–230 (footnote omitted).

[15] *Id.*, at 315, 380 N. E. 2d, at 232 (Wachtler, J., dissenting).

[16] *Id.*, at 319–320, 380 N. E. 2d, at 235 (Cooke, J., dissenting).

great a measure of constitutional protection.[17] The dissenters noted "the existence of statutes and the American Law Institute imprimatur codifying the common-law rule authorizing warrantless arrests in private homes" and acknowledged that "the statutory authority of a police officer to make a warrantless arrest in this State has been in effect for almost 100 years," but concluded that "neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented" and "can never be a substitute for reasoned analysis." [18]

Before addressing the narrow question presented by these appeals,[19] we put to one side other related problems that are

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[17] "Although the point has not been squarely adjudicated since *Coolidge* [v. *New Hampshire*, 403 U. S. 443,] (see *United States* v. *Watson*, 423 US 411, 418, n. 6), its proper resolution, it is submitted, is manifest. At the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed (see, *e. g.*, *Boyd* v. *United States*, 116 US 616, 630; *Camara* v. *Municipal Ct.*, 387 US 523, 528). To achieve that end, the framers of the amendment interposed the warrant requirement between the public and the police, reflecting their conviction that the decision to enter a dwelling should not rest with the officer in the field, but rather with a detached and disinterested Magistrate (*McDonald* v. *United States*, 335 US 451, 455–456; *Johnson* v. *United States*, 333 US 10, 13–14). Inasmuch as the purpose of the Fourth Amendment is to guard against arbitrary governmental invasions of the home, the necessity of prior judicial approval should control any contemplated entry, regardless of the purpose for which that entry is sought. By definition, arrest entries must be included within the scope of the amendment, for while such entries are for persons, not things, they are, nonetheless, violations of privacy, the chief evil that the Fourth Amendment was designed to deter (*Silverman* v. *United States*, 365 US 505, 511)." *Id.*, at 320–321, 380 N. E. 2d, at 235–236 (Cooke, J., dissenting).

[18] *Id.*, at 324, 380 N. E. 2d, at 238 (Cooke, J., dissenting).

[19] Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court. See *Raley* v. *Ohio*, 360 U. S. 423, 436.

*not* presented today. Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. The Court of Appeals majority treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant,[20] and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as "exigent circumstances," that would justify a warrantless entry into a home for the purpose of either arrest or search.

Nor do these cases raise any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect. The police broke into Payton's apartment intending to arrest Payton, and they arrested Riddick in his own dwelling. We also note that in neither case is it argued that the police lacked probable cause to believe that the suspect was at home when they entered. Finally, in both cases we are dealing with entries into homes made without the consent of any occupant. In *Payton*, the police used crowbars to break down the door and in *Riddick*, although his 3-year-old son answered the door; the police entered before Riddick had an opportunity either to object or to consent.

## II

It is familiar history that indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment.[21] Indeed, as originally

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[20] 45 N. Y. 2d, at 308, 380 N. E. 2d, at 228. Judge Wachtler in dissent, however, would have upheld the warrantless entry in Payton's case on exigency grounds, and therefore agreed with the majority's refusal to suppress the shell casing. See *id.*, at 315, 380 N. E. 2d, at 232.

[21] "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the

proposed in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures.[22] As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause.[23] The Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

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Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."' *Boyd* v. *United States*, 116 U. S. 616, 625." *Stanford* v. *Texas*, 379 U. S. 476, 481–482.

See also J. Landynski, Search and Seizure and the Supreme Court 19–48 (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 13–78 (1937); T. Taylor, Two Studies in Constitutional Interpretation 19–44 (1969).

[22] "'The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.' Annals of Cong., 1st Cong., 1st sess., p. 452." Lasson, *supra*, at 100, n. 77.

[23] "The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the

> and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment. Almost a century ago the Court stated in resounding terms that the principles reflected in the Amendment "reached farther than the concrete form" of the specific cases that gave it birth, and "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life." *Boyd* v. *United States*, 116 U. S. 616, 630. Without pausing to consider whether that broad language may require some qualification, it is sufficient to note that the warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable. *Beck* v. *Ohio*, 379 U. S. 89. Cf. *Delaware* v. *Prouse*, 440 U. S. 648. Indeed, as MR. JUSTICE POWELL noted in his concurrence in *United States* v. *Watson*, the arrest of a person is "quintessentially a seizure." 423 U. S., at 428.

The simple language of the Amendment applies equally to seizures of persons and to seizures of property. Our analysis in this case may therefore properly commence with rules that have been well established in Fourth Amendment litigation involving tangible items. As the Court reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*,

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warrant is a question no longer left to implication to be derived from the phraseology of the Amendment." Lasson, *supra*, at 103. (Footnote omitted.)

407 U. S. 297, 313. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort.[24]

It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable.[25] Yet it is also well settled that

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[24] As Mr. Justice Jackson so cogently observed in *Johnson* v. *United States*, 333 U. S. 10, 13–14:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." (Footnotes omitted.)

[25] As the Court stated in *Coolidge* v. *New Hampshire:*

"Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'

. . . . .

"It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se*

objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. The distinction between a warrantless seizure in an open area and such a seizure on private premises was plainly stated in *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 354:

> "It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer."

As the late Judge Leventhal recognized, this distinction has equal force when the seizure of a person is involved. Writing on the constitutional issue now before us for the United States Court of Appeals for the District of Columbia Circuit sitting en banc, *Dorman* v. *United States*, 140 U. S. App. D. C. 313, 435 F. 2d 385 (1970), Judge Leventhal first noted the settled rule that warrantless arrests in public places are valid. He immediately recognized, however, that

> "[a] greater burden is placed . . . on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Id.*, at 317, 435 F. 2d, at 389. (Footnote omitted.)

His analysis of this question then focused on the long-settled premise that, absent exigent circumstances, a warrant-

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unreasonable in the absence of some one of a number of well defined 'exigent circumstances.'" 403 U. S., at 474–475, 477–478.

Although Mr. Justice Harlan joined this portion of the Court's opinion, he expressly disclaimed any position on the issue now before us. *Id.*, at 492 (concurring opinion).

less entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.[26] He reasoned that the constitutional protection afforded to the individual's interest in the privacy of his own home is equally applicable to a warrantless entry for the purpose of arresting a resident of the house; for it is inherent in such an entry that a search for the suspect may be required before he can be apprehended.[27] Judge Leventhal concluded that an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection.

This reasoning has been followed in other Circuits.[28] Thus, the Second Circuit recently summarized its position:

"To be arrested in the home involves not only the inva-

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[26] As Mr. Justice Harlan wrote for the Court:

"It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. *Agnello* v. *United States*, 269 U. S. 20, 33; *Taylor* v. *United States*, 286 U. S. 1, 6. The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. See, *e. g.*, *Johnson* v. *United States*, 333 U. S. 10, 14; *McDonald* v. *United States*, 335 U. S. 451, 455; cf. *Giordenello* v. *United States*, [357 U. S. 480]. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, which implements the Fourth Amendment by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law-enforcement officers justifies the issuance of a search warrant. Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Jones* v. *United States*, 357 U. S., at 497–498 (footnote omitted).

[27] See generally Rotenberg & Tanzer, Searching for the Person to be Seized, 35 Ohio St. L. J. 56 (1974).

[28] See n. 4, *supra*.

> sion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present." *United States* v. *Reed*, 572 F. 2d 412, 423 (1978), cert. denied *sub nom. Goldsmith* v. *United States*, 439 U. S. 913.

We find this reasoning to be persuasive and in accord with this Court's Fourth Amendment decisions.

The majority of the New York Court of Appeals, however, suggested that there is a substantial difference in the relative intrusiveness of an entry to search for property and an entry to search for a person. See n. 13, *supra*. It is true that the area that may legally be searched is broader when executing a search warrant than when executing an arrest warrant in the home. See *Chimel* v. *California*, 395 U. S. 752. This difference may be more theoretical than real, however, because the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrest.[29]

But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very

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[29] See, *e. g.*, the facts in Payton's case, n. 5, *supra*.

core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

## III

Without contending that *United States* v. *Watson*, 423 U. S. 411, decided the question presented by these appeals, New York argues that the reasons that support the *Watson* holding require a similar result here. In *Watson* the Court relied on (a) the well-settled common-law rule that a warrantless arrest in a public place is valid if the arresting officer had probable cause to believe the suspect is a felon; [30] (b) the clear consensus among the States adhering to that well-settled common-law rule; [31] and (c) the expression of the judgment of Congress that such an arrest is "reasonable." [32] We con-

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[30] "The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest. 10 Halsbury's Laws of England 344–345 (3d ed. 1955); 4 W. Blackstone, Commentaries *292; 1 J. Stephen, A History of the Criminal Law of England 193 (1883); 2 M. Hale, Pleas of the Crown *72–74; Wilgus, Arrests Without a Warrant, 22 Mich. L. Rev. 541, 547–550, 686–688 (1924); *Samuel* v. *Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K. B. 1780); *Beckwith* v. *Philby*, 6 Barn. & Cress. 635, 108 Eng. Rep. 585 (K. B. 1827)." 423 U. S., at 418–419.

[31] "The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact. It appears in almost all of the States in the form of express statutory authorization." *Id.*, at 421–422.

[32] "This is the rule Congress has long directed its principal law enforcement officers to follow. Congress has plainly decided against condi-

sider each of these reasons as it applies to a warrantless entry into a home for the purpose of making a routine felony arrest.

A

An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive,[33] consideration of what the Framers of the Amendment might have thought to be reasonable. Initially, it should be noted that the common-law rules of arrest developed in legal contexts that substantially differ from the cases now before us. In these cases, which involve application of the exclusionary rule, the issue is whether cer-

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tioning warrantless arrest power on proof of exigent circumstances." *Id.*, at 423.

The Court added in a footnote:

"Until 1951, 18 U. S. C. § 3052 conditioned the warrantless arrest powers of the agents of the Federal Bureau of Investigation on there being reasonable grounds to believe that the person would escape before a warrant could be obtained. The Act of Jan. 10, 1951, c. 1221, § 1, 64 Stat. 1239, eliminated this condition." *Id.*, at 423, n. 13.

[33] There are important differences between the common-law rules relating to searches and seizures and those that have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions. For example, whereas the kinds of property subject to seizure under warrants had been limited to contraband and the fruits or instrumentalities of crime, see *Gouled* v. *United States*, 255 U. S. 298, 309, the category of property that may be seized, consistent with the Fourth Amendment, has been expanded to include mere evidence. *Warden* v. *Hayden*, 387 U. S. 294. Also, the prohibitions of the Amendment have been extended to protect against invasion by electronic eavesdropping of an individual's privacy in a phone booth not owned by him, *Katz* v. *United States*, 389 U. S. 347, even though the earlier law had focused on the physical invasion of the individual's person or property interests in the course of a seizure of tangible objects. See *Olmstead* v. *United States*, 277 U. S. 438, 466. Thus, this Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage.

tain evidence is admissible at trial.[34] See *Weeks* v. *United States*, 232 U. S. 383. At common law, the question whether an arrest was authorized typically arose in civil damages actions for trespass or false arrest, in which a constable's authority to make the arrest was a defense. See, *e. g.*, *Leach* v. *Money*, 19 How. St. Tr. 1001, 97 Eng. Rep. 1075 (K. B. 1765). Additionally, if an officer was killed while attempting to effect an arrest, the question whether the person resisting the arrest was guilty of murder or manslaughter turned on whether the officer was acting within the bounds of his authority. See M. Foster, Crown Law 308, 312 (1762). See also *West* v. *Cabell*, 153 U. S. 78, 85.

A study of the common law on the question whether a constable had the authority to make warrantless arrests in the home on mere suspicion of a felony—as distinguished from an officer's right to arrest for a crime committed in his presence—reveals a surprising lack of judicial decisions and a deep divergence among scholars.

The most cited evidence of the common-law rule consists of an equivocal dictum in a case actually involving the sheriff's authority to enter a home to effect service of civil process. In *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195–196 (K. B. 1603), the Court stated:

> "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors; and that appears well by the stat. of Westm. 1. c. 17. (which is but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors the destruc-

[34] The issue is not whether a defendant must stand trial, because he must do so even if the arrest is illegal. See *United States* v. *Crews*, *ante*, at 474.

> tion or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 E. 2. Execut. 252. where it is said, that the K.'s officer who comes to do execution, &c. may open the doors which are shut, and break them, if he cannot have the keys; which proves, that he ought first to demand them, 7 E. 3. 16." (Footnotes omitted.)

This passage has been read by some as describing an entry without a warrant. The context strongly implies, however, that the court was describing the extent of authority in executing the King's writ. This reading is confirmed by the phrase "either to arrest him, or to do *other* execution of the K.'s process" and by the further point that notice was necessary because the owner may "not know of the *process*." In any event, the passage surely cannot be said unambiguously to endorse warrantless entries.

The common-law commentators disagreed sharply on the subject.[35] Three distinct views were expressed. Lord Coke,

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[35] Those modern commentators who have carefully studied the early works agree with that assessment. See ALI, A Model Code of Pre-Arraignment Procedure 308 (Prop. Off. Draft 1975) (hereinafter ALI Code); Blakey, The Rule of Announcement and Unlawful Entry: *Miller* v. *United States* and *Ker* v. *California*, 112 U. Pa. L. Rev. 499, 502 (1964); Comment, Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle, 82 Dick. L. Rev. 167, 168, n. 5 (1977); Note, The Constitutionality of Warrantless Home Arrests, 78 Colum. L. Rev. 1550, 1553 (1978) ("the major common-law commentators appear to be equally divided on the requirement of a warrant for a home arrest") (hereinafter Columbia Note); Recent Development, Warrantless Arrests by Police Survive a Constitutional Challenge—*United States* v. *Watson*, 14 Am. Crim. L. Rev. 193, 210–211 (1976). Accord, *Miller* v. *United States*, 357 U. S. 301, 307–308; *Accarino* v. *United States*, 85 U. S. App. D. C. 394, 402, 179 F. 2d 456, 464 (1949).

widely recognized by the American colonists "as the greatest authority of his time on the laws of England," [36] clearly viewed a warrantless entry for the purpose of arrest to be illegal.[37]

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[36] "Foremost among the titles to be found in private libraries of the time were the works of Coke, the great expounder of Magna Carta, and similar books on English liberties. The inventory of the library of Arthur Spicer, who died in Richmond County, Virginia, in 1699, included Coke's *Institutes*, another work on Magna Carta, and a 'Table to Cooks Reports.' The library of Colonel Daniel McCarty, a wealthy planter and member of the Virginia House of Burgesses who died in Westmoreland County in 1724, included Coke's *Reports*, an abridgment of Coke's *Reports*, *Coke on Littleton*, and 'Rights of the Comons of England.' Captain Charles Colston, who died in Richmond County, Virginia, in 1724, and Captain Christopher Cocke, who died in Princess Anne County, Virginia, in 1716, each had copies of Coke's *Institutes*. That these libraries were typical is suggested by a study of the contents of approximately one hundred private libraries in colonial Virginia, which revealed that the most common law title found in these libraries was Coke's *Reports*. They were typical of other colonies, too. Another study, of the inventories of forty-seven libraries throughout the colonies between 1652 and 1791, found that of all the books on either law or politics in these libraries the most common was Coke's *Institutes* (found in 27 of the 47 libraries). The second most common title was a poor second; it was Grotius' *War and Peace*, found in 16 of the libraries (even Locke's *Two Treatises on Government* appeared in only 13 of the libraries).

"The popularity of Coke in the colonies is of no small significance. Coke himself had been at the eye of the storm in the clashes between King and Parliament in the early seventeenth century which did so much to shape the English Constitution. He rose to high office at the instance of the Crown—he was Speaker of the House of Commons and Attorney General under Queen Elizabeth, and James I made Coke first his Chief Justice of Common Pleas and then his Chief Justice of King's Bench. During this time Coke gained an unchallenged position as the greatest authority of his time on the laws of England, frequently burying an opponent with learned citations from early Year Books. Having been a champion of the Crown's interests, Coke (in a change of role that recalls the metamorphosis of Thomas à Becket) became instead the defender of the common law." A. Howard, The Road From Runnymede 118–119 (1968). (Footnotes omitted.)

[37] "[N]either the Constable, nor any other can break open any house for the apprehension of the party suspected or charged with the

Burn, Foster, and Hawkins agreed,[38] as did East and Russell, though the latter two qualified their opinions by stating that if an entry to arrest was made without a warrant, the officer was perhaps immune from liability for the trespass if the suspect was actually guilty.[39] Blackstone, Chitty, and Stephen took the opposite view, that entry to arrest without a warrant was legal,[40] though Stephen relied on Blackstone who, along with Chitty, in turn relied exclusively on Hale. But Hale's view was not quite so unequivocally expressed.[41]

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felony. . . ." 4 E. Coke, Institutes *177. Coke also was of the opinion that only a King's indictment could justify the breaking of doors to effect an arrest founded on suspicion, and that not even a warrant issued by a justice of the peace was sufficient authority. *Ibid.* He was apparently alone in that view, however.

[38] 1 R. Burn, The Justice of the Peace and Parish Officer 87 (6th ed. 1758) ("where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day (Mr. *Hawkins* says) that no one can justify the breaking open doors in order to apprehend him . . ."); M. Foster, Crown Law 321 (1762); 2 W. Hawkins, Pleas of the Crown 139 (6th ed. 1787): "But where one lies under a probable suspicion only, and is not indicted, it seems the better (*d*) opinion at this day, That no one can justify the breaking open doors in order to apprehend him." The contrary opinion of Hale, see n. 41, *infra*, is acknowledged among the authorities cited in the footnote (*d*).

[39] 1 E. East, Pleas of the Crown 322 (1806) ("[Y]et a bare suspicion of guilt against the party will not warrant a proceeding to this extremity [the breaking of doors], unless the officer be armed with a magistrate's warrant grounded on such suspicion. It will at least be at the peril of proving that the party so taken on suspicion was guilty."); 1 W. Russell, A Treatise on Crimes and Misdemeanors 745 (1819) (similar rule).

[40] 4 W. Blackstone, Commentaries *292; 1 J. Chitty, A Practical Treatise on the Criminal Law 23 (1816); 4 H. Stephen, New Commentaries on the Laws of England 359 (1845).

[41] 1 M. Hale, Pleas of the Crown 583 (1736); 2 *id.*, at 90–95. At page 92 of the latter volume, Hale writes that in the case where the constable suspects a person of a felony, "if the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break the door, tho he have no warrant. 13 *E.* 4. 9. *a.*" Although it would appear that Hale might have

Further, Hale appears to rely solely on a statement in an early Yearbook, quoted in *Burdett* v. *Abbot*, 14 East 1, 155, 104 Eng. Rep. 501, 560 (K. B. 1811): [42]

> " 'that for felony, or suspicion of felony, a man may break open the house to take the felon; for it is for the commonweal to take them.' "

Considering the diversity of views just described, however, it is clear that the statement was never deemed authoritative. Indeed, in *Burdett*, the statement was described as an "extrajudicial opinion." *Ibid.*[43]

It is obvious that the common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places. Indeed, particularly considering the prominence of Lord Coke, the weight of authority as it appeared to the Framers was to the effect that a warrant was required, or at the minimum that there were substantial risks in proceeding without one. The common-law sources display a sensitivity to privacy interests that could not have been lost on the Framers. The zealous and frequent repetition of the adage that a "man's house is his castle," made it abundantly clear that both in England [44]

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meant to limit warrantless home arrests to cases of hot pursuit, the quoted passage has not typically been read that way.

[42] Apparently, the Yearbook in which the statement appears has never been fully translated into English.

[43] That assessment is consistent with the description by this Court of the holding of that Yearbook case in *Miller* v. *United States*, 357 U. S., at 307:

"As early as the 13th Yearbook of Edward IV (1461–1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party."

[44] Thus, in *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B. 1603), the court stated: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills one *per infortun'*, without any intent, yet it is felony, and in such case he

and in the Colonies "the freedom of one's house" was one of the most vital elements of English liberty.[45]

Thus, our study of the relevant common law does not provide the same guidance that was present in *Watson*. Whereas

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shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing, and therewith agree 3 E. 3. Coron. 303, & 305. & 26 Ass. pl. 23. So it is held in 21 H. 7. 39. every one may assemble his friends and neighbours to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence: and the reason of all this is, because *domus sua cuique est tutissimum refugium.*" (Footnotes omitted.)

In the report of that case it is noted that although the sheriff may break open the door of a barn without warning to effect service of a writ, a demand and refusal must precede entry into a dwelling house. *Id.*, at 91b, n. (e), 77 Eng. Rep., at 196, n. (e):

"And this privilege is confined to a man's dwelling-house, or out-house adjoining thereto, for the sheriff on a *fieri facias* may break open the door of a barn standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close. *Penton* v. *Brown*, 2 Keb. 698, S. C. 1 Sid. 186."

[45] "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege." 2 Legal Papers of John Adams 142 (L. Wroth & H. Zobel eds. 1965).

We have long recognized the relevance of the common law's special regard for the home to the development of Fourth Amendment jurisprudence. See, *e. g.*, *Weeks* v. *United States*, 232 U. S. 383, 390:

"Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution, said: 'The maxim that "every man's house is his castle," is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.' 'Accordingly,' says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, 'no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony, and then the sheriff must be furnished with a warrant, and take

the rule concerning the validity of an arrest in a public place was supported by cases directly in point and by the unanimous views of the commentators, we have found no direct authority supporting forcible entries into a home to make a routine arrest and the weight of the scholarly opinion is somewhat to the contrary. Indeed, the absence of any 17th- or 18th-century English cases directly in point, together with the unequivocal endorsement of the tenet that "a man's house is his castle," strongly suggests that the prevailing practice was not to make such arrests except in hot pursuit or when authorized by a warrant. Cf. *Agnello* v. *United States*, 269 U. S. 20, 33. In all events, the issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted.

B

A majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances. At this time, 24 States permit such warrantless entries; [46] 15 States clearly

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great care lest he commit a trespass. This principle is jealously insisted upon."

Although the quote from Lieber concerning warrantless arrests in the home is on point for today's cases, it was dictum in *Weeks*. For that case involved a warrantless arrest in a public place, and a warrantless search of Week's home in his absence.

[46] Twenty-three States authorize such entries by statute. See Ala. Code § 15–10–4 (1975); Alaska Stat. Ann. § 12.25.100 (1972); Ark. Stat. Ann. § 43–414 (1977); Fla. Stat. § 901.19 (1979); Haw. Rev. Stat. § 803–11 (1977); Idaho Code § 19–611 (1979); Ill. Rev. Stat., ch. 38, § 107—5 (d) (1971); La. Code Crim. Proc. Ann., Art. 224 (West 1967); Mich. Comp. Laws § 764.21 (1970); Minn. Stat. § 629.34 (1978); Miss. Code Ann. § 99–3–11 (1973); Mo. Rev. Stat. § 544.200 (1978); Neb. Rev. Stat. § 29–411 (1975); Nev. Rev. Stat. § 171.138 (1977); N. Y. Crim. Proc. Law §§ 140.15 (4), 120.80 (4), (5) (McKinney 1971); N. C. Gen. Stat. § 15A–401 (e) (1978); N. D. Cent. Code § 29–06–14 (1974); Ohio Rev. Code Ann. § 2935.12 (1975); Okla. Stat., Tit. 22, § 197 (1971); S. D. Comp. Laws Ann. § 23A–3–5 (1979); Tenn. Code Ann. § 40–807 (1975); Utah Code

prohibit them, though 3 States do so on federal constitutional grounds alone;[47] and 11 States have apparently taken no position on the question.[48]

But these current figures reflect a significant decline during the last decade in the number of States permitting warrantless entries for arrest. Recent dicta in this Court raising questions about the practice, see n. 1, *supra*, and Federal Courts of Appeals' decisions on point, see n. 4, *supra*, have led state courts to focus on the issue. Virtually all of the state courts that have had to confront the constitutional issue directly have held warrantless entries into the home to arrest to be invalid in the absence of exigent circumstances. See nn. 2, 3, *supra*. Three state courts have relied on Fourth Amendment

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Ann. § 77–13–12 (Repl. 1978); Wash. Rev. Code § 10.31.040 (1976). One State has authorized warrantless arrest entries by judicial decision. See *Shanks* v. *Commonwealth*, 463 S. W. 2d 312, 315 (Ky. App. 1971).

A number of courts in these States, though not directly deciding the issue, have recognized that the constitutionality of such entries is open to question. See *People* v. *Wolgemuth*, 69 Ill. 2d 154, 370 N. E. 2d 1067 (1977), cert. denied, 436 U. S. 908; *State* v. *Ranker*, 343 So. 2d 189 (La. 1977) (citing both State and Federal Constitutions); *State* v. *Lasley*, 306 Minn. 224, 236 N. W. 2d 604 (1975), cert. denied, 429 U. S. 1077; *State* v. *Novak*, 428 S. W. 2d 585 (Mo. 1968); *State* v. *Page*, 277 N. W. 2d 112 (N. D. 1979); *State* v. *Max*, 263 N. W. 2d 685 (S. D. 1978).

[47] Four States prohibit warrantless arrests in the home by statute, see Ga. Code §§ 27–205, 27–207 (1978) (also prohibits warrantless arrests outside the home absent exigency); Ind. Code §§ 35–1–19–4, 35–1–19–6 (1976); Mont. Code Ann. § 46–6–401 (1979) (same as Georgia); S. C. Code § 23–15–60 (1976); 1 by state common law, see *United States* v. *Hall*, 468 F. Supp. 123, 131, n. 16 (ED Tex. 1979); *Moore* v. *State*, 149 Tex. Crim. 229, 235–236, 193 S. W. 2d 204, 207 (1946); and 10 on constitutional grounds, see n. 3, *supra*.

[48] Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Virginia and Wyoming. The courts of three of the above-listed States have recognized that the constitutionality of warrantless home arrest is subject to question. See *State* v. *Anonymous*, 34 Conn. Supp. 531, 375 A. 2d 417 (Super. Ct., App. Sess. 1977); *Nilson* v. *State*, 272 Md. 179, 321 A. 2d 301 (1974); *Palmigiano* v. *Mullen*, 119 R. I. 363, 377 A. 2d 242 (1977).

grounds alone, while seven have squarely placed their decisions on both federal and state constitutional grounds.[49] A number of other state courts, though not having had to confront the issue directly, have recognized the serious nature of the constitutional question.[50] Apparently, only the Supreme Court of Florida and the New York Court of Appeals in this case have expressly upheld warrantless entries to arrest in the face of a constitutional challenge.[51]

A longstanding, widespread practice is not immune from constitutional scrutiny. But neither is it to be lightly brushed aside. This is particularly so when the constitutional standard is as amorphous as the word "reasonable," and when custom and contemporary norms necessarily play such a large role in the constitutional analysis. In this case, although the weight of state-law authority is clear, there is by no means the kind of virtual unanimity on this question that was present in *United States* v. *Watson*, with regard to warrantless arrests in public places. See 423 U. S., at 422–423. Only 24 of the 50 States currently sanction warrantless entries into the home to arrest, see nn. 46–48, *supra*, and there is an obvious declining trend. Further, the strength of the trend is greater than the numbers alone indicate. Seven state courts have recently held that warrantless home arrests violate their respective *State* Constitutions. See n. 3, *supra*. That is significant because by invoking a state constitutional provision, a state court immunizes its decision from review by this Court.[52] This heightened degree of immutability underscores the depth of the principle underlying the result.

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[49] See cases cited in n. 3, *supra*.

[50] See cases cited in nn. 46, 48, *supra*.

[51] See n. 2, *supra*.

[52] See, *e. g.*, *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126. See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

C

No congressional determination that warrantless entries into the home are "reasonable" has been called to our attention. None of the federal statutes cited in the *Watson* opinion reflects any such legislative judgment.[53] Thus, that support for the *Watson* holding finds no counterpart in this case.

MR. JUSTICE POWELL, concurring in *United States* v. *Watson*, *supra*, at 429, stated:

> "But logic sometimes must defer to history and experience. The Court's opinion emphasizes the historical sanction accorded warrantless felony arrests [in public places]."

In this case, however, neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.[54]

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[53] The statute referred to in n. 32, *supra*, provides:

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U. S. C. § 3052.

It says nothing either way about executing warrantless arrests in the home. See also ALI Code, at 308; Columbia Note 1554–1555, n. 26.

[54] There can be no doubt that Pitt's address in the House of Commons in March 1763 echoed and re-echoed throughout the Colonies:

"'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!'" *Miller* v. *United States*, 357 U. S., at 307.

## IV

The parties have argued at some length about the practical consequences of a warrant requirement as a precondition to a felony arrest in the home.[55] In the absence of any evidence that effective law enforcement has suffered in those States that already have such a requirement, see nn. 3, 47, *supra*, we are inclined to view such arguments with skepticism. More fundamentally, however, such arguments of policy must give way to a constitutional command that we consider to be unequivocal.

Finally, we note the State's suggestion that only a search warrant based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake, and since such a warrant requirement is manifestly impractical, there need be no warrant of any kind. We find this ingenious argument unpersuasive. It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reason-

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[55] The State of New York argues that the warrant requirement will pressure police to seek warrants and make arrests too hurriedly, thus increasing the likelihood of arresting innocent people; that it will divert scarce resources thereby interfering with the police's ability to do thorough investigations; that it will penalize the police for deliberate planning; and that it will lead to more injuries. Appellants counter that careful planning is possible and that the police need not rush to get a warrant, because if an exigency arises necessitating immediate arrest in the course of an orderly investigation, arrest without a warrant is permissible; that the warrant procedure will decrease the likelihood that an innocent person will be arrested; that the inconvenience of obtaining a warrant and the potential for diversion of resources is exaggerated by the State; and that there is no basis for the assertion that the time required to obtain a warrant would create peril.

able to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Because no arrest warrant was obtained in either of these cases, the judgments must be reversed and the cases remanded to the New York Court of Appeals for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE BLACKMUN, concurring.

I joined the Court's opinion in *United States* v. *Watson*, 423 U. S. 411 (1976), upholding, on probable cause, the warrantless arrest in a public place. I, of course, am still of the view that the decision in *Watson* is correct. The Court's balancing of the competing governmental and individual interests properly occasioned that result. Where, however, the warrantless arrest is in the suspect's home, that same balancing requires that, absent exigent circumstances, the result be the other way. The suspect's interest in the sanctity of his home then outweighs the governmental interests.

I therefore join the Court's opinion, firm in the conviction that the result in *Watson* and the result here, although opposite, are fully justified by history and by the Fourth Amendment.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that absent exigent circumstances officers may never enter a home during the daytime to arrest for a dangerous felony unless they have first obtained a warrant. This hard-and-fast rule, founded on erroneous assumptions concerning the intrusiveness of home arrest entries,

finds little or no support in the common law or in the text and history of the Fourth Amendment. I respectfully dissent.

## I

As the Court notes, *ante*, at 591, the common law of searches and seizures, as evolved in England, as transported to the Colonies, and as developed among the States, is highly relevant to the present scope of the Fourth Amendment. *United States* v. *Watson*, 423 U. S. 411, 418–422 (1976); *id.*, at 425, 429 (POWELL, J., concurring); *Gerstein* v. *Pugh*, 420 U. S. 103, 111, 114 (1975); *Carroll* v. *United States*, 267 U. S. 132, 149–153 (1925); *Bad Elk* v. *United States*, 177 U. S. 529, 534–535 (1900); *Boyd* v. *United States*, 116 U. S. 616, 622–630 (1886); *Kurtz* v. *Moffitt*, 115 U. S. 487, 498–499 (1885). Today's decision virtually ignores these centuries of common-law development, and distorts the historical meaning of the Fourth Amendment, by proclaiming for the first time a rigid warrant requirement for all nonexigent home arrest entries.

### A

As early as the 15th century the common law had limited the Crown's power to invade a private dwelling in order to arrest. A Year Book case of 1455 held that in civil cases the sheriff could not break doors to arrest for debt or trespass, for the arrest was then only in the private interests of a party. Y. B. 13 Edw. IV, 9a. To the same effect is *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1603). The holdings of these cases were condensed in the maxim that "every man's house is his castle." H. Broom, Legal Maxims *321–*329.

However, this limitation on the Crown's power applied only to private civil actions. In cases directly involving the Crown, the rule was that "[t]he king's keys unlock all doors." Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 800 (1924). The Year Book case cited above stated a different rule for criminal cases: for a felony, or suspicion of felony, one may break into the dwelling house to take the felon, for

it is for the common weal and to the interest of the King to take him. Likewise, *Semayne's Case* stated in dictum:

> "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter." 5 Co. Rep., at 91b, 77 Eng. Rep., at 195.

Although these cases established the Crown's power to enter a dwelling in criminal cases, they did not directly address the question of whether a constable could break doors to arrest without authorization by a warrant. At common law, the constable's office was twofold. As conservator of the peace, he possessed, *virtute officii*, a "great original and inherent authority with regard to arrests," 4 W. Blackstone, Commentaries *292 (hereinafter Blackstone), and could "without any other warrant but from [himself] arrest felons, and those that [were] probably suspected of felonies," 2 M. Hale, Pleas of the Crown 85 (1736) (hereinafter Hale); see *United States* v. *Watson*, *supra*, at 418–419. Second, as a subordinate public official, the constable performed ministerial tasks under the authorization and direction of superior officers. See 1 R. Burn, The Justice of the Peace and Parish Officer 295 (6th ed. 1758) (hereinafter Burn); 2 W. Hawkins, Pleas of the Crown 130–132 (6th ed. 1787) (hereinafter Hawkins). It was in this capacity that the constable executed warrants issued by justices of the peace. The warrant authorized the constable to take actions beyond his inherent powers.[1] It also ensured that he actually carried out his instructions, by giving him clear notice of his duty, for the breach of which he could be punished, 4 Blackstone *291; 1 Burn 295; 2 Hale 88, and by relieving him from civil liability even if probable cause to

[1] For example, a constable could arrest for breaches of the peace committed outside his presence only under authority of a warrant. *Bad Elk* v. *United States*, 177 U. S. 529, 534–535 (1900); 1 Burn 294; 2 Hale 90; 2 Hawkins 130.

arrest were lacking, 4 Blackstone *291; 1 Burn 295–296; M. Dalton, The Country Justice 579 (1727 ed.) (hereinafter Dalton); 2 Hawkins 132–133. For this reason, warrants were sometimes issued even when the act commanded was within the constable's inherent authority. Dalton 576.

As the Court notes, commentators have differed as to the scope of the constable's inherent authority, when not acting under a warrant, to break doors in order to arrest. Probably the majority of commentators would permit arrest entries on probable suspicion even if the person arrested were not in fact guilty. 4 Blackstone *292; 1 Burn 87–88; [2] 1 J. Chitty, Criminal Law 23 (1816) (hereinafter Chitty); Dalton 426; 1 Hale 583; 2 *id.*, at 90–94. These authors, in short, would have permitted the type of home arrest entries that occurred in the present cases. The inclusion of Blackstone in this list is particularly significant in light of his profound impact on the minds of the colonists at the time of the framing of the Constitution and the ratification of the Bill of Rights.

A second school of thought, on which the Court relies, held that the constable could not break doors on mere "bare suspicion." M. Foster, Crown Law 321 (1762); 2 Hawkins 139; 1 E. East, Pleas of the Crown 321–322 (1806); 1 W. Russell, Treatise on Crimes and Misdemeanors 745 (1819) (hereinafter Russell). Cf. 4 E. Coke, Institutes *177. Although this doc-

[2] The Court cites Burn for the proposition that home arrests on mere suspicion are invalid. *Ante*, at 595, n. 38. In fact, Burn appears to be of the opposite view. Burn contrasts the case of arrests by private citizens, which cannot be justified unless the person arrested was actually guilty of felony, with that of arrests by constables:

"But a *constable* in such case may justify, and the reason of the difference is this: because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it, and therefore they cannot break open doors; but in case of a constable, he is punishable if he omit it upon complaint." 1 Burn 87–88 (emphasis in original).

Burn apparently refers to a constable's duty to act without a warrant on complaint of a citizen.

trine imposed somewhat greater limitations on the constable's inherent power, it does not support the Court's hard-and-fast rule against warrantless nonexigent home entries upon probable cause. East and Russell state explicitly what Foster and Hawkins imply: although mere "bare suspicion" will not justify breaking doors, the constable's action would be justifiable if the person arrested were *in fact* guilty of a felony. These authorities can be read as imposing a somewhat more stringent requirement of probable cause for arrests in the home than for arrests elsewhere. But they would not bar nonexigent, warrantless home arrests in all circumstances, as the Court does today. And Coke is flatly contrary to the Court's rule requiring a warrant, since he believed that even a warrant would not justify an arrest entry until the suspect had been indicted.

Finally, it bears noting that the doctrine against home entries on bare suspicion developed in a period in which the validity of *any* arrest on bare suspicion—even one occurring outside the home—was open to question. Not until Lord Mansfield's decision in *Samuel* v. *Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K. B. 1780), was it definitively established that the constable could arrest on suspicion even if it turned out that no felony had been committed. To the extent that the commentators relied on by the Court reasoned from any general rule against warrantless arrests based on bare suspicion, the rationale for their position did not survive *Samuel* v. *Payne*.

B

The history of the Fourth Amendment does not support the rule announced today. At the time that Amendment was adopted the constable possessed broad inherent powers to arrest. The limitations on those powers derived, not from a warrant "requirement," but from the generally ministerial nature of the constable's office at common law. Far from restricting the constable's arrest power, the institution of the

warrant was used to expand that authority by giving the constable delegated powers of a superior officer such as a justice of the peace. Hence at the time of the Bill of Rights, the warrant functioned as a powerful tool of law enforcement rather than as a protection for the rights of criminal suspects.

In fact, it was the abusive use of the warrant power, rather than any excessive zeal in the discharge of peace officers' inherent authority, that precipitated the Fourth Amendment. That Amendment grew out of colonial opposition to the infamous general warrants known as writs of assistance, which empowered customs officers to search at will, and to break open receptacles or packages, wherever they suspected uncustomed goods to be. *United States* v. *Chadwick*, 433 U. S. 1, 7–8 (1977); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51–78 (1937) (hereinafter Lasson). The writs did not specify where searches could occur and they remained effective throughout the sovereign's lifetime. *Id.*, at 54. In effect, the writs placed complete discretion in the hands of executing officials. Customs searches of this type were beyond the inherent power of common-law officials and were the subject of court suits when performed by colonial customs agents not acting pursuant to a writ. *Id.*, at 55.

The common law was the colonists' ally in their struggle against writs of assistance. Hale and Blackstone had condemned general warrants, 1 Hale 580; 4 Blackstone *291, and fresh in the colonists' minds were decisions granting recovery to parties arrested or searched under general warrants on suspicion of seditious libel. *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765); *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K. B. 1763); *Wilkes* v. *Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (K. B. 1763). When James Otis, Jr., delivered his courtroom oration against writs of assistance in 1761, he looked to the common law in asserting that the writs, if not construed specially, were void as a

form of general warrant. 2 Legal Papers of John Adams 139–144 (L. Wroth & H. Zobel eds. 1965).[3]

Given the colonists' high regard for the common law, it is indeed unlikely that the Framers of the Fourth Amendment intended to derogate from the constable's inherent common-law authority. Such an argument was rejected in the important early case of *Rohan* v. *Sawin*, 59 Mass. 281, 284–285 (1851):

> "It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace-officers . . . to arrest without warrant those who have committed felonies. The public safety, and the due apprehension of criminals, charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law." [4]

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[3] The Court cites Pitt's March 1763 oration in the House of Commons as indicating an "overriding respect for the sanctity of the home." *Ante*, at 601, and n. 54. But this speech was in opposition to a proposed excise tax on cider. 15 Parliamentary History of England 1307 (1813). Nothing in it remotely suggests that Pitt objected to the constable's traditional power of warrantless entry into dwellings to arrest for felony.

[4] See also *North* v. *People*, 139 Ill. 81, 105, 28 N. E. 966, 972 (1891) (Warrant Clause "does not abridge the right to arrest without warrant, in cases where such arrest could be lawfully made at common law before the adoption of the present constitution"); *Wakely* v. *Hart*, 6 Binn. 316, 319 (Pa. 1814) (rules permitting arrest without a warrant are "principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution. The whole section indeed was nothing more than an affirmance of the common law. . .").

That the Framers were concerned about warrants, and not about the constable's inherent power to arrest, is also evident from the text and legislative history of the Fourth Amendment. That provision first reaffirms the basic principle of common law, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." The Amendment does not here purport to limit or restrict the peace officer's inherent power to arrest or search, but rather assumes an existing right against actions in excess of that inherent power and ensures that it remain inviolable. As I have noted, it was not generally considered "unreasonable" at common law for officers to break doors in making warrantless felony arrests. The Amendment's second clause is directed at the actions of officers taken in their ministerial capacity pursuant to writs of assistance and other warrants. In contrast to the first Clause, the second Clause does purport to alter colonial practice: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

That the Fourth Amendment was directed towards safeguarding the rights at common law, and restricting the warrant practice which gave officers vast new powers beyond their inherent authority, is evident from the legislative history of that provision. As originally drafted by James Madison, it was directed *only* at warrants; so deeply ingrained was the basic common-law premise that it was not even expressed:

> "The rights of the people to be secured in their persons[,] their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." 1 Annals of Cong. 452 (1789).

The Committee of Eleven reported the provision as follows:

> "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized." *Id.*, at 783.

The present language was adopted virtually at the last moment by the Committee of Three, which had been appointed only to arrange the Amendments rather than to make substantive changes in them. Lasson 101. The Amendment passed the House; but "the House seems never to have consciously agreed to the Amendment in its present form." *Ibid.* In any event, because the sanctity of the common-law protections was assumed from the start, it is evident that the change made by the Committee of Three was a cautionary measure without substantive content.

In sum, the background, text, and legislative history of the Fourth Amendment demonstrate that the purpose was to restrict the abuses that had developed with respect to warrants; the Amendment preserved common-law rules of arrest. Because it was not considered generally unreasonable at common law for officers to break doors to effect a warrantless felony arrest, I do not believe that the Fourth Amendment was intended to outlaw the types of police conduct at issue in the present cases.

C

Probably because warrantless arrest entries were so firmly accepted at common law, there is apparently no recorded constitutional challenge to such entries in the 19th-century cases. Common-law authorities on both sides of the Atlantic, however, continued to endorse the validity of such arrests. *E. g.*, 1 J. Bishop, Commentaries on the Law of Criminal Procedure §§ 195–199 (2d ed. 1872); 1 Chitty 23; 1 J. Colby, A Practical Treatise upon the Criminal Law and Practice of the State

of New York 73–74 (1868); F. Heard, A Practical Treatise on the Authority and Duties of Trial Justices, District, Police, and Municipal Courts, in Criminal Cases 135, 148 (1879); 1 Russell 745. Like their predecessors, these authorities conflicted as to whether the officer would be liable in damages if it were shown that the person arrested was not guilty of a felony. But all agreed that warrantless home entries would be permissible in at least some circumstances. None endorsed the rule of today's decision that a warrant is always required, absent exigent circumstances, to effect a home arrest.

Apparently the first official pronouncement on the validity of warrantless home arrests came with the adoption of state codes of criminal procedure in the latter 19th and early 20th centuries. The great majority of these codes accepted and endorsed the inherent authority of peace officers to enter dwellings in order to arrest felons. By 1931, 24 of 29 state codes authorized such warrantless arrest entries.[5] By 1975, 31 of 37 state codes authorized warrantless home felony arrests.[6] The American Law Institute included such authority in its model legislation in 1931 and again in 1975.[7]

The first direct judicial holding on the subject of warrantless home arrests seems to have been *Commonwealth* v. *Phelps*, 209 Mass. 396, 95 N. E. 868 (1911). The holding in this case that such entries were constitutional became the settled rule in the States for much of the rest of the century. See Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 803 (1924). Opinions of this Court also assumed that such arrests were constitutional.[8]

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[5] American Law Institute, Code of Criminal Procedure 254–255 (Off. Draft 1931) (hereinafter Code).

[6] American Law Institute, A Model Code of Pre-Arraignment Procedure App. XI (Prop. Off. Draft 1975) (hereinafter Model Code).

[7] Code §§ 21, 28; Model Code § 120.6 (1).

[8] See *Johnson* v. *United States*, 333 U. S. 10, 15 (1948) (stating in dictum that officers could have entered hotel room without a warrant in

This Court apparently first questioned the reasonableness of warrantless nonexigent entries to arrest in *Jones* v. *United States,* 357 U. S. 493, 499–500 (1958), noting in dictum that such entries would pose a "grave constitutional question" if carried out at night.[9] In *Coolidge* v. *New Hampshire,* 403 U. S. 443, 480 (1971), the Court stated, again in dictum:

> "[I]f [it] is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption. Such a re-examination 'would confront us with a grave constitutional question, namely, whether the forcible nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.' *Jones* v. *United States,* 357 U. S., at 499–500."

Although *Coolidge* and *Jones* both referred to the special problem of warrantless entries during the nighttime,[10] it is not surprising that state and federal courts have tended to read those dicta as suggesting a broader infirmity applying to daytime entries also, and that the majority of recent decisions have been against the constitutionality of all types of warrantless, nonexigent home arrest entries. As the Court con-

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order to make an arrest "for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty") (footnote omitted); *Ker* v. *California,* 374 U. S. 23, 38 (1963) (plurality opinion); *Sabbath* v. *United States,* 391 U. S. 585, 588 (1968).

[9] One Court of Appeals had previously held such entries unconstitutional. *Accarino* v. *United States,* 85 U. S. App. D. C. 394, 179 F. 2d 456 (1949).

[10] As I discuss *infra,* there may well be greater constitutional problems with nighttime entries.

cedes, however, even despite *Coolidge* and *Jones* it remains the case that

> "[a] majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances. At this time, 24 States permit such warrantless entries; 15 States clearly prohibit them, though 3 States do so on federal constitutional grounds alone; and 11 States have apparently taken no position on the question." *Ante*, at 598–599 (footnotes omitted).

This consensus, in the face of seemingly contrary dicta from this Court, is entitled to more deference than the Court today provides. Cf. *United States* v. *Watson*, 423 U. S. 411 (1976).

D

In the present cases, as in *Watson*, the applicable federal statutes are relevant to the reasonableness of the type of arrest in question. Under 18 U. S. C. § 3052, specified federal agents may "make arrests without warrants for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States, if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." On its face this provision authorizes federal agents to make warrantless arrests anywhere, including the home. Particularly in light of the accepted rule at common law and among the States permitting warrantless home arrests, the absence of any explicit exception for the home from § 3052 is persuasive evidence that Congress intended to authorize warrantless arrests there as well as elsewhere.

Further, Congress has not been unaware of the special problems involved in police entries into the home. In 18 U. S. C. § 3109, it provided that

> "[t]he officer may break open any outer or inner door or window of a house, or any part of a house, or anything

> therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance. . . ."

See *Miller* v. *United States*, 357 U. S. 301 (1958). In explicitly providing authority to enter when executing a search warrant, Congress surely did not intend to derogate from the officers' power to effect an arrest entry either with or without a warrant. Rather, Congress apparently assumed that this power was so firmly established either at common law or by statute that no explicit grant of arrest authority was required in § 3109. In short, although the Court purports to find no guidance in the relevant federal statutes, I believe that fairly read they authorize the type of police conduct at issue in these cases.

## II

### A

Today's decision rests, in large measure, on the premise that warrantless arrest entries constitute a particularly severe invasion of personal privacy. I do not dispute that the home is generally a very private area or that the common law displayed a special "reverence . . . for the individual's right of privacy in his house." *Miller* v. *United States*, *supra*, at 313. However, the Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere. Cf. *Ybarra* v. *Illinois*, 444 U. S. 85 (1979); *Katz* v. *United States*, 389 U. S. 347, 351 (1967); *Boyd* v. *United States*, 116 U. S., at 630. It is necessary in each case to assess realistically the actual extent of invasion of constitutionally protected privacy. Further, as MR. JUSTICE POWELL observed in *United States* v. *Watson*, *supra*, at 428 (concurring opinion), all arrests involve serious intrusions into an individual's privacy and dignity. Yet we settled in *Watson* that the intrusiveness of a public arrest is not enough to mandate the obtaining of a warrant. The inquiry in the present case, therefore, is whether the incremen-

tal intrusiveness that results from an arrest's being made *in the dwelling* is enough to support an inflexible constitutional rule requiring warrants for such arrests whenever exigent circumstances are not present.

Today's decision ignores the carefully crafted restrictions on the common-law power of arrest entry and thereby overestimates the dangers inherent in that practice. At common law, absent exigent circumstances, entries to arrest could be made only for felony. Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors.[11] Further, it seems generally accepted that entries could be made only during daylight hours.[12] And, in my view, the officer entering to arrest must have reasonable grounds to believe, not only that the arrestee has committed a crime, but also that the person suspected is present in the house at the time of the entry.[13]

These four restrictions on home arrests—felony, knock and announce, daytime, and stringent probable cause—constitute powerful and complementary protections for the privacy interests associated with the home. The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most

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[11] *Miller* v. *United States*, 357 U. S. 301, 308 (1958); *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1603); Dalton 427; 2 Hale 90; 2 Hawkins 138.

[12] Model Code § 120.6 (3). Cf. *Jones* v. *United States*, 357 U. S. 493, 499–500 (1958); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 480 (1971).

[13] I do not necessarily disagree with the Court's discussion of the quantum of probable cause necessary to make a valid home arrest. The Court indicates that only an arrest warrant, and not a search warrant, is required. *Ante*, at 602–603. To obtain the warrant, therefore, the officers need only show probable cause that a crime has been committed and that the suspect committed it. However, under today's decision, the officers apparently need an extra increment of probable cause when executing the arrest warrant, namely, grounds to believe that the suspect is within the dwelling. *Ibid.*

serious crimes. The knock-and-announce and daytime requirements protect individuals against the fear, humiliation, and embarrassment of being roused from their beds in states of partial or complete undress. And these requirements allow the arrestee to surrender at his front door, thereby maintaining his dignity and preventing the officers from entering other rooms of the dwelling. The stringent probable-cause requirement would help ensure against the possibility that the police would enter when the suspect was not home, and, in searching for him, frighten members of the family or ransack parts of the house, seizing items in plain view. In short, these requirements, taken together, permit an individual suspected of a serious crime to surrender at the front door of his dwelling and thereby avoid most of the humiliation and indignity that the Court seems to believe necessarily accompany a house arrest entry. Such a front-door arrest, in my view, is no more intrusive on personal privacy than the public warrantless arrests which we found to pass constitutional muster in *Watson*.[14]

All of these limitations on warrantless arrest entries are satisfied on the facts of the present cases. The arrests here were for serious felonies—murder and armed robbery—and both occurred during daylight hours. The authorizing statutes required that the police announce their business and demand entry; neither Payton nor Riddick makes any contention that these statutory requirements were not fulfilled. And it is not argued that the police had no probable cause to believe that both Payton and Riddick were in their dwellings at the time of the entries. Today's decision, therefore, sweeps away any possibility that warrantless home entries might be permitted in some limited situations other than those in which

[14] If the suspect flees or hides, of course, the intrusiveness of the entry will be somewhat greater; but the policeman's hands should not be tied merely because of the possibility that the suspect will fail to cooperate with legitimate actions by law enforcement personnel.

exigent circumstances are present. The Court substitutes, in one sweeping decision, a rigid constitutional rule in place of the common-law approach, evolved over hundreds of years, which achieved a flexible accommodation between the demands of personal privacy and the legitimate needs of law enforcement.

A rule permitting warrantless arrest entries would not pose a danger that officers would use their entry power as a pretext to justify an otherwise invalid warrantless search. A search pursuant to a warrantless arrest entry will rarely, if ever, be as complete as one under authority of a search warrant. If the suspect surrenders at the door, the officers may not enter other rooms. Of course, the suspect may flee or hide, or may not be at home, but the officers cannot anticipate the first two of these possibilities and the last is unlikely given the requirement of probable cause to believe that the suspect is at home. Even when officers are justified in searching other rooms, they may seize only items within the arrestee's possession or immediate control or items in plain view discovered during the course of a search reasonably directed at discovering a hiding suspect. Hence a warrantless home entry is likely to uncover far less evidence than a search conducted under authority of a search warrant. Furthermore, an arrest entry will inevitably tip off the suspects and likely result in destruction or removal of evidence not uncovered during the arrest. I therefore cannot believe that the police would take the risk of losing valuable evidence through a pretextual arrest entry rather than applying to a magistrate for a search warrant.

B

While exaggerating the invasion of personal privacy involved in home arrests, the Court fails to account for the danger that its rule will "severely hamper effective law enforcement," *United States* v. *Watson*, 423 U. S., at 431 (POWELL, J., concurring); *Gerstein* v. *Pugh*, 420 U. S., at 113. The policeman

on his beat must now make subtle discriminations that perplex even judges in their chambers. As MR. JUSTICE POWELL noted, concurring in *United States* v. *Watson*, *supra*, police will sometimes delay making an arrest, even after probable cause is established, in order to be sure that they have enough evidence to convict. Then, if they suddenly have to arrest, they run the risk that the subsequent exigency will not excuse their prior failure to obtain a warrant. This problem cannot effectively be cured by obtaining a warrant as soon as probable cause is established because of the chance that the warrant will go stale before the arrest is made.

Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community. The police could reduce the likelihood of escape by staking out all possible exits until the circumstances become clearly exigent or a warrant is obtained. But the costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.

The uncertainty inherent in the exigent-circumstances determination burdens the judicial system as well. In the case of searches, exigent circumstances are sufficiently unusual that this Court has determined that the benefits of a warrant outweigh the burdens imposed, including the burdens on the judicial system. In contrast, arrests recurringly involve exigent circumstances, and this Court has heretofore held that a warrant can be dispensed with without undue sacrifice in Fourth Amendment values. The situation should be no dif-

ferent with respect to arrests in the home. Under today's decision, whenever the police have made a warrantless home arrest there will be the possibility of "endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like," *United States* v. *Watson, supra,* at 423–424.

Our cases establish that the ultimate test under the Fourth Amendment is one of "reasonableness." *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307, 315–316 (1978); *Camara* v. *Municipal Court,* 387 U. S. 523, 539 (1967). I cannot join the Court in declaring unreasonable a practice which has been thought entirely reasonable by so many for so long. It would be far preferable to adopt a clear and simple rule: after knocking and announcing their presence, police may enter the home to make a daytime arrest without a warrant when there is probable cause to believe that the person to be arrested committed a felony and is present in the house. This rule would best comport with the common-law background, with the traditional practice in the States, and with the history and policies of the Fourth Amendment. Accordingly, I respectfully dissent.

MR. JUSTICE REHNQUIST, dissenting.

The Court today refers to both *Payton* and *Riddick* as involving "routine felony arrests." I have no reason to dispute the Court's characterization of these arrests, but cannot refrain from commenting on the social implications of the result reached by the Court. Payton was arrested for the murder of the manager of a gas station; Riddick was arrested for two armed robberies. If these are indeed "routine felony arrests," which culminated in convictions after trial upheld by the state courts on appeal, surely something is amiss in the process of the administration of criminal justice whereby these convictions are now set aside by this Court under the exclusionary rule which we have imposed upon the States under

the Fourth and Fourteenth Amendments to the United States Constitution.

I fully concur in and join the dissenting opinion of MR. JUSTICE WHITE. There is significant historical evidence that we have over the years misread the history of the Fourth Amendment in connection with searches, elevating the warrant requirement over the necessity for probable cause in a way which the Framers of that Amendment did not intend. See T. Taylor, Two Studies in Constitutional Interpretation 38–50 (1969). But one may accept all of that as *stare decisis*, and still feel deeply troubled by the transposition of these same errors into the area of actual arrests of felons within their houses with respect to whom there is probable cause to suspect guilt of the offense in question.

# OWEN *v.* CITY OF INDEPENDENCE, MISSOURI, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78–1779. Argued January 8, 1980—Decided April 16, 1980

After the City Council of respondent city moved that reports of an investigation of the city police department be released to the news media and turned over to the prosecutor for presentation to the grand jury and that the City Manager take appropriate action against the persons involved in the wrongful activities brought out in the investigative reports, the City Manager discharged petitioner from his position as Chief of Police. No reason was given for the dismissal and petitioner received only a written notice stating that the dismissal was made pursuant to a specified provision of the city charter. Subsequently, petitioner brought suit in Federal District Court under 42 U. S. C. § 1983 against the city, the respondent City Manager, and the respondent members of the City Council in their official capacities, alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, and seeking declaratory and injunctive relief. The District Court, after a bench trial, entered judgment for respondents. The Court of Appeals ultimately affirmed, holding that although the city had violated petitioner's rights under the Fourteenth Amendment, nevertheless all the respondents, including the city, were entitled to qualified immunity from liability based on the good faith of the city officials involved.

*Held:* A municipality has no immunity from liability under § 1983 flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability. Pp. 635–658.

(a) By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman*, 424 U. S. 409, 417. Its language is absolute and unqualified, and no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the statute imposes liability upon *"every person"* (held in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, to encompass municipal corporations) who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." And this expansive sweep of § 1983's language is confirmed by its legislative history. Pp. 635–636.

(b) Where an immunity was well established at common law and where its rationale was compatible with the purposes of § 1983, the statute has been construed to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded respondent city by the Court of Appeals. Pp. 637–644.

(c) The application and rationale underlying both the doctrine whereby a municipality was held immune from tort liability with respect to its "governmental" functions but not for its "proprietary" functions, and the doctrine whereby a municipality was immunized for its "discretionary" or "legislative" activities but not for those which were "ministerial" in nature, demonstrate that neither of these common-law doctrines could have been intended to limit a municipality's liability under § 1983. The principle of sovereign immunity from which a municipality's immunity for "governmental" functions derives cannot serve as the basis for the qualified privilege respondent city claims under § 1983, since sovereign immunity insulates a municipality from unconsented suits altogether, the presence or absence of good faith being irrelevant, and since the municipality's "governmental" immunity is abrogated by the sovereign's enactment of a statute such as § 1983 making it amenable to suit. And the doctrine granting a municipality immunity for "discretionary" functions, which doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality, cannot serve as the foundation for a good-faith immunity under § 1983, since a municipality has no "discretion" to violate the Federal Constitution. Pp. 644–650.

(d) Rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the purpose of § 1983 to provide protection to those persons wronged by the abuse of governmental authority and to deter future constitutional violations, and by considerations of public policy. In view of the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. The concerns that justified decisions conferring qualified immunities on various government officials—the injustice, particularly in the absence of bad faith, of subjecting the official to liability, and the danger that the threat of such liability would deter the official's willingness to execute his office effectively—are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue. Pp. 650–656.

589 F. 2d 335, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post*, p. 658.

*Irving Achtenberg* argued the cause for petitioner. With him on the briefs was *David Achtenberg*.

*Richard G. Carlisle* argued the cause and filed a brief for respondents.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

*Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), overruled *Monroe* v. *Pape*, 365 U. S. 167 (1961), insofar as *Monroe* held that local governments were not among the "persons" to whom 42 U. S. C. § 1983 applies and were therefore wholly immune from suit under the statute.[1] *Monell* reserved decision, however, on the question whether local governments, although not entitled to an absolute immunity, should be afforded some form of official immunity in § 1983 suits. 436 U. S., at 701. In this action brought by petitioner in the District Court for the Western District of Missouri, the Court of Appeals for the Eighth Circuit held that respondent city of Independence, Mo., "is entitled to qualified immunity from liability" based on the good faith

*Briefs of *amici curiae* urging reversal were filed by *Bruce J. Ennis*, *Oscar G. Chase*, and *Nancy Stearns* for the American Civil Liberties Union et al.; and by *Michael H. Gottesman*, *Robert M. Weinberg*, *David Rubin*, *William E. Caldwell*, *John B. Jones, Jr.*, *Norman Redlich*, *William L. Robinson*, and *Norman Chachkin* for the National Education Association et al.

[1] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

of its officials: "We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice." 589 F. 2d 335, 337–338 (1978). We granted certiorari. 444 U. S. 822 (1979). We reverse.

## I

The events giving rise to this suit are detailed in the District Court's findings of fact, 421 F. Supp. 1110 (1976). On February 20, 1967, Robert L. Broucek, then City Manager of respondent city of Independence, Mo., appointed petitioner George D. Owen to an indefinite term as Chief of Police.[2] In 1972, Owen and a new City Manager, Lyle W. Alberg, engaged in a dispute over petitioner's administration of the Police Department's property room. In March of that year, a handgun, which the records of the Department's property room stated had been destroyed, turned up in Kansas City in the possession of a felon. This discovery prompted Alberg to initiate an investigation of the management of the property room. Although the probe was initially directed by petitioner, Alberg soon transferred responsibility for the investigation to the city's Department of Law, instructing the City Counselor to supervise its conduct and to inform him directly of its findings.

Sometime in early April 1972, Alberg received a written report on the investigation's progress, along with copies of confidential witness statements. Although the City Auditor found that the Police Department's records were insufficient to permit an adequate accounting of the goods contained in the property room, the City Counselor concluded that there was no evidence of any criminal acts or of any violation of

[2] Under § 3.3 (1) of the city's charter, the City Manager has sole authority to "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads, of administrative departments and all other administrative officers and employees of the city. . . ."

state or municipal law in the administration of the property room. Alberg discussed the results of the investigation at an informal meeting with several City Council members and advised them that he would take action at an appropriate time to correct any problems in the administration of the Police Department.

On April 10, Alberg asked petitioner to resign as Chief of Police and to accept another position within the Department, citing dissatisfaction with the manner in which petitioner had managed the Department, particularly his inadequate supervision of the property room. Alberg warned that if petitioner refused to take another position in the Department his employment would be terminated, to which petitioner responded that he did not intend to resign.

On April 13, Alberg issued a public statement addressed to the Mayor and the City Council concerning the results of the investigation. After referring to "discrepancies" found in the administration, handling, and security of public property, the release concluded that "[t]here appears to be no evidence to substantiate any allegations of a criminal nature" and offered assurances that "[s]teps have been initiated on an administrative level to correct these discrepancies." *Id.*, at 1115. Although Alberg apparently had decided by this time to replace petitioner as Police Chief, he took no formal action to that end and left for a brief vacation without informing the City Council of his decision.[3]

While Alberg was away on the weekend of April 15 and 16, two developments occurred. Petitioner, having consulted with counsel, sent Alberg a letter demanding written notice of the charges against him and a public hearing with a reason-

[3] Alberg returned from his vacation on the morning of April 17, and immediately met informally with four members of the City Council. Although the investigation of the Police Department was discussed, and although Alberg testified that he had found a replacement for petitioner by that time, he did not inform the Council members of his intention to discharge petitioner.

able opportunity to respond to those charges.[4] At approximately the same time, City Councilman Paul L. Roberts asked for a copy of the investigative report on the Police Department property room. Although petitioner's appeal received no immediate response, the Acting City Manager complied with Roberts' request and supplied him with the audit report and witness statements.

On the evening of April 17, 1972, the City Council held its regularly scheduled meeting. After completion of the planned agenda, Councilman Roberts read a statement he had prepared on the investigation.[5] Among other allegations,

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[4] The letter, dated April 15, 1972, stated in part:

"My counsel . . . have advised me that even though the City Charter may give you authority to relieve me, they also say you cannot do so without granting me my constitutional rights of due process, which includes a written charge and specifications, together with a right to a public hearing and to be represented by counsel and to cross-examine those who may appear against me.

. . . . . .

"In spite of your recent investigation and your public statement given to the public press, your relief and discharge of me without a full public hearing upon written charges will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part.

"Such action by you would be in violation of my civil rights as granted by the Constitution and Congress of the United States and you would be liable in damages to me. Further it would be in violation of the Missouri Administrative Procedure Act.

"May I have an expression from you that you do not intend to relieve me or in the alternative give me a written charge and specifications of your basis for your grounds of intention to relieve me and to grant me a public hearing with a reasonable opportunity to respond to the charge and a right to be represented by counsel."

City Manager Alberg stated that he did not receive the letter until after petitioner's discharge.

[5] Roberts' statement, which is reproduced in full in 421 F. Supp. 1110, 1116, n. 2 (1976), in part recited:

"On April 2, 1972, the City Council was notified of the existence of an investigative report concerning the activities of the Chief of Police of the

Roberts charged that petitioner had misappropriated Police Department property for his own use, that narcotics and money had "mysteriously disappeared" from his office, that traffic tickets had been manipulated, that high ranking police officials had made "inappropriate" requests affecting the police court, and that "things have occurred causing the unusual release of felons." At the close of his statement, Roberts moved that the investigative reports be released to the news media and turned over to the prosecutor for presentation to the grand jury, and that the City Manager "take all direct

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City of Independence, certain police officers and activities of one or more other City officials. On Saturday, April 15th for the first time I was able to see these 27 voluminous reports. The contents of these reports are astoundingly shocking and virtually unbelievable. They deal with the disappearance of 2 or more television sets from the police department and signed statement that they were taken by the Chief of Police for his own personal use.

"The reports show that numerous firearms properly in the police department custody found their way into the hands of others including undesirables and were later found by other law enforcement agencies.

"Reports whow [*sic*] that narcotics held by the Independence Missouri Chief of Police have mysteriously disappeared. Reports also indicate money has mysteriously disappeared. Reports show that traffic tickets have been manipulated. The reports show inappropriate requests affecting the police court have come from high ranking police officials. Reports indicate that things have occurred causing the unusual release of felons. The reports show gross inefficiencies on the part of a few of the high ranking officers of the police department.

"In view of the contents of these reports, I feel that the information in the reports backed up by signed statements taken by investigators is so bad that the council should immediately make available to the news media access to copies of all of these 27 voluminous investigative reports so the public can be told what has been going on in Independence. I further believe that copies of these reports should be turned over and referred to the prosecuting attorney of Jackson County, Missouri for consideration and presentation to the next Grand Jury. I further insist that the City Manager immediately take direct and appropriate action, permitted under the Charter, against such persons as are shown by the investigation to have been involved."

and appropriate action" against those persons "involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports." After some discussion, the City Council passed Roberts' motion with no dissents and one abstention.[6]

City Manager Alberg discharged petitioner the very next day. Petitioner was not given any reason for his dismissal; he received only a written notice stating that his employment as Chief of Police was "[t]erminated under the provisions of Section 3.3 (1) of the City Charter."[7] Petitioner's earlier demand for a specification of charges and a public hearing was ignored, and a subsequent request by his attorney for an appeal of the discharge decision was denied by the city on the grounds that "there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." App. 26–27.

The local press gave prominent coverage both to the City Council's action and petitioner's dismissal, linking the discharge to the investigation.[8] As instructed by the City Council, Alberg referred the investigative reports and witness statements to the Prosecuting Attorney of Jackson County, Mo.,

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[6] Ironically, the official minutes of the City Council meeting indicate that concern was expressed by some members about possible adverse legal consequences that could flow from their release of the reports to the media. The City Counselor assured the Council that although an action might be maintained against any witnesses who made unfounded accusations, "the City does have governmental immunity in this area . . . and neither the Council nor the City as a municipal corporation can be held liable for libelous slander." App. 20–23.

[7] See n. 2, *supra*.

[8] The investigation and its culmination in petitioner's firing received front-page attention in the local press. See, *e. g.*, "Lid Off Probe, Council Seeks Action," Independence Examiner, Apr. 18, 1972, Tr. 24–25; "Independence Accusation. Police Probe Demanded," Kansas City Times, Apr. 18, 1972, Tr. 25; "Probe Culminates in Chief's Dismissal," Independence Examiner, Apr. 19, 1972, Tr. 26; "Police Probe Continues; Chief Ousted," Community Observer, Apr. 20, 1972, Tr. 26.

for consideration by a grand jury. The results of the audit and investigation were never released to the public, however. The grand jury subsequently returned a "no true bill," and no further action was taken by either the City Council or City Manager Alberg.

## II

Petitioner named the city of Independence, City Manager Alberg, and the present members of the City Council in their official capacities as defendants in this suit.[9] Alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, petitioner sought declaratory and injunctive relief, including a hearing on his discharge, back-pay from the date of discharge, and attorney's fees. The District Court, after a bench trial, entered judgment for respondents. 421 F. Supp. 1110 (1976).[10]

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[9] Petitioner did not join former Councilman Roberts in the instant litigation. A separate action seeking defamation damages was brought in state court against Roberts and Alberg in their individual capacities. Petitioner dismissed the state suit against Alberg and reached a financial settlement with Roberts. See 560 F. 2d 925, 930 (CA8 1977).

[10] The District Court, relying on *Monroe* v. *Pape*, 365 U. S. 167 (1961), and *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973), held that § 1983 did not create a cause of action against the city, but that petitioner could base his claim for relief directly on the Fourteenth Amendment. On the merits, however, the court determined that petitioner's discharge did not deprive him of any constitutionally protected property interest because, as an untenured employee, he possessed neither a contractual nor a *de facto* right to continued employment as Chief of Police. Similarly, the court found that the circumstances of petitioner's dismissal did not impose a stigma of illegal or immoral conduct on his professional reputation, and hence did not deprive him of any liberty interest.

The District Court offered three reasons to support its conclusion: First, because the actual discharge notice stated only that petitioner was "[t]erminated under the provisions of Section 3.3 (1) of the City Charter," nothing in his official record imputed any stigmatizing conduct to him. Second, the court found that the City Council's actions had no causal connection to petitioner's discharge, for City Manager Alberg had apparently

The Court of Appeals initially reversed the District Court. 560 F. 2d 925 (1977).[11] Although it agreed with the District Court that under Missouri law petitioner possessed no property interest in continued employment as Police Chief, the Court of Appeals concluded that the city's allegedly false public accusations had blackened petitioner's name and reputation, thus depriving him of liberty without due process of law. That the stigmatizing charges did not come from the City Manager and were not included in the official discharge notice was, in the court's view, immaterial. What was im-

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made his decision to hire a new Police Chief before the Council's April 17th meeting. Lastly, the District Court determined that petitioner was "completely exonerated" from any charges of illegal or immoral conduct by the City Counselor's investigative report, Alberg's public statements, and the grand jury's return of a "no true bill." 421 F. Supp., at 1121–1122.

As an alternative ground for denying relief, the District Court ruled that the city was entitled to assert, and had in fact established, a qualified immunity against liability based on the good faith of the individual defendants who acted as its agents: "[D]efendants have clearly shown by a preponderance of the evidence that neither they, nor their predecessors, were aware in April 1972, that, under the circumstances, the Fourteenth Amendment accorded plaintiff the procedural rights of notice and a hearing at the time of his discharge. Defendants have further proven that they cannot reasonably be charged with constructive notice of such rights since plaintiff was discharged prior to the publication of the Supreme Court decisions in *Roth* v. *Board of Regents*, [408 U. S. 564 (1972)], and *Perry* v. *Sindermann*, [408 U. S. 593 (1972)]." *Id.*, at 1123.

[11] Both parties had appealed from the District Court's decision. On respondents' challenge to the court's assumption of subject-matter jurisdiction under 28 U. S. C. § 1331, the Court of Appeals held that the city was subject to suit for reinstatement and backpay under an implied right of action arising directly from the Fourteenth Amendment. 560 F. 2d, at 932–934. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Because the Court of Appeals concluded that petitioner's claim could rest directly on the Fourteenth Amendment, it saw no need to decide whether he could recover backpay under § 1983 from the individual defendants in their official capacities as part of general equitable relief, even though the award would be paid by the city. 560 F. 2d, at 932.

portant, the court explained, was that "the official actions of the city council released charges against [petitioner] contemporaneous and, in the eyes of the public, connected with that discharge." *Id.*, at 937.[12]

Respondents petitioned for review of the Court of Appeals' decision. Certiorari was granted, and the case was remanded for further consideration in light of our supervening decision in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). 438 U. S. 902 (1978). The Court of Ap-

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[12] As compensation for the denial of his constitutional rights, the Court of Appeals awarded petitioner damages in lieu of backpay. The court explained that petitioner's termination without a hearing must be considered a nullity, and that ordinarily he ought to remain on the payroll and receive wages until a hearing is held and a proper determination on his retention is made. But because petitioner had reached the mandatory retirement age during the course of the litigation, he could not be reinstated to his former position. Thus the compensatory award was to be measured by the amount of money petitioner would likely have earned to retirement had he not been deprived of his good name by the city's actions, subject to mitigation by the amounts actually earned, as well as by the recovery from Councilman Roberts in the state defamation suit.

The Court of Appeals rejected the municipality's assertion of a good-faith defense, relying upon a footnote in *Wood* v. *Strickland*, 420 U. S. 308, 314–315, n. 6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well"), and two of its own precedents awarding backpay in § 1983 actions against school boards. See *Wellner* v. *Minnesota State Jr. College Bd.*, 487 F. 2d 153 (CA8 1973); *Cooley* v. *Board of Educ. of Forrest City School Dist.*, 453 F. 2d 282 (CA8 1972). The court concluded that the primary justification for a qualified immunity—the fear that public officials might hesitate to discharge their duties if faced with the prospect of personal monetary liability—simply did not exist where the relief would be borne by a governmental unit rather than the individual officeholder. In addition, the Court of Appeals seemed to take issue with the District Court's finding of good faith on the part of the City Council: "The city officials may have acted in good faith in refusing the hearing, but lack of good faith is evidenced by the nature of the unfair attack made upon the appellant by Roberts in the official conduct of the City's business. The District Court did not address the good faith defense in light of Roberts' defamatory remarks." 560 F. 2d, at 941.

peals on the remand reaffirmed its original determination that the city had violated petitioner's rights under the Fourteenth Amendment, but held that all respondents, including the city, were entitled to qualified immunity from liability. 589 F. 2d 335 (1978).

*Monell* held that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U. S., at 694. The Court of Appeals held in the instant case that the municipality's official policy was responsible for the deprivation of petitioner's constitutional rights: "[T]he stigma attached to [petitioner] in connection with his discharge was caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy. Such conduct amounted to official policy causing the infringement of [petitioner's] constitutional rights, in violation of section 1983." 589 F. 2d, at 337.[13]

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[13] Although respondents did not cross petition on this issue, they have raised a belated challenge to the Court of Appeals' ruling that petitioner was deprived of a protected "liberty" interest. See Brief for Respondents 45–46. We find no merit in their contention, however, and decline to disturb the determination of the court below.

*Wisconsin* v. *Constantineau*, 400 U. S. 433, 437 (1971), held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In *Board of Regents* v. *Roth*, 408 U. S. 564, 573 (1972), we explained that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and associations in his community" would qualify as something "the government is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city—through the unanimous resolution of the City Council—released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged

Nevertheless, the Court of Appeals affirmed the judgment of the District Court denying petitioner any relief against the respondent city, stating:

> "The Supreme Court's decisions in *Board of Regents* v. *Roth*, 408 U. S. 564 . . . (1972), and *Perry* v. *Sindermann*, 408 U. S. 593 . . . (1972), crystallized the rule establishing the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. The Court decided those two cases two months after the discharge in the instant case. Thus, officials of the City of Independence could not have been aware of [petitioner's] right to a name-clearing hearing in connection with the discharge. The City of Independence should not be charged with predicting the future course of constitutional law. We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice. We hold the City not liable for actions it could not reasonably have known violated [petitioner's] constitutional rights." *Id.*, at 338 (footnote and citations omitted).[14]

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the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact "cause" petitioner's discharge, the defamatory and stigmatizing charges certainly "occur[red] in the course of the termination of employment." Cf. *Paul* v. *Davis*, 424 U. S. 693, 710 (1976). Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law.

[14] Cf. *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975) ("Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student").

We turn now to the reasons for our disagreement with this holding.[15]

## III

Because the question of the scope of a municipality's immunity from liability under § 1983 is essentially one of statutory construction, see *Wood* v. *Strickland*, 420 U. S. 308, 314, 316 (1975); *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951), the starting point in our analysis must be the language of the statute itself. *Andrus* v. *Allard*, 444 U. S. 51, 56 (1979); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976). Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act imposes liability upon *"every person"* who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[16] And *Monell* held that these words were intended to encompass municipal corporations as well as natural "persons."

Moreover, the congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13—the forerunner of § 1983—confirm the expansive sweep of the stat-

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[15] The Courts of Appeals are divided on the question whether local governmental units are entitled to a qualified immunity based on the good faith of their officials. Compare *Bertot* v. *School Dist. No. 1*, 613 F. 2d 245 (CA10 1979) (en banc), *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569 (CA7 1975), and *Hander* v. *San Jacinto Jr. College*, 519 F. 2d 273 (CA5), rehearing denied, 522 F. 2d 204 (1975), all refusing to extend a qualified immunity to the governmental entity, with *Parman* v. *Campbell*, 612 F. 2d 848 (CA4 1980) (en banc), and *Sala* v. *County of Suffolk*, 604 F. 2d 207 (CA2 1979), granting defendants a "good-faith" immunity.

[16] See n. 1, *supra*.

utory language. Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the Act was to receive:

> "I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (hereinafter Globe App.).

Similar views of the Act's broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress. See *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 683–687.[17]

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[17] As we noted in *Monell* v. *New York City Dept. of Social Services*, see 436 U. S., at 685–686, n. 45, even the opponents of § 1 acknowledged that its language conferred upon the federal courts the entire power that Congress possessed to remedy constitutional violations. The remarks of Senator Thurman are illustrative:

"[This section's] whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action

However, notwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson* v. *Ray*, 386 U. S. 547, 555 (1967). Thus in *Tenney* v. *Brandhove*, *supra*, after tracing the development of an absolute legislative privilege from its source in 16th-century England to its inclusion in the Federal and State Constitutions, we concluded that Congress "would [not] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language" of § 1983. 341 U. S., at 376.

Subsequent cases have required that we consider the personal liability of various other types of government officials. Noting that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction," *Pierson* v. *Ray*, *supra*, at 553–554, held that the absolute immunity traditionally accorded judges was preserved under § 1983. In that same case, local police officers were held to enjoy a "good faith and probable cause" defense to § 1983 suits similar to that which existed in false arrest actions at common law. 386 U. S., at 555–557. Several more recent decisions have found immunities of varying scope appropriate for different state and local officials sued under § 1983. See *Procunier* v. *Navarette*, 434 U. S. 555 (1978) (qualified im-

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against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. . . .

". . . That is the language of this bill. Whether it is the intent or not I know not, but it is the language of the bill; for there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used." Globe App. 216–217.

munity for prison officials and officers); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (absolute immunity for prosecutors in initiating and presenting the State's case); *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975) (qualified immunity for superintendent of state hospital); *Wood* v. *Strickland*, 420 U. S. 308 (1975) (qualified immunity for local school board members); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974) (qualified "good-faith" immunity for state Governor and other executive officers for discretionary acts performed in the course of official conduct).

In each of these cases, our finding of § 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pachtman*, *supra*, at 421. Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.[18]

A

Since colonial times, a distinct feature of our Nation's system of governance has been the conferral of political power upon public and municipal corporations for the management of matters of local concern. As *Monell* recounted, by 1871,

[18] The governmental immunity at issue in the present case differs significantly from the official immunities involved in our previous decisions. In those cases, various government officers had been sued in their individual capacities, and the immunity served to insulate them from personal liability for damages. Here, in contrast, only the liability of the municipality itself is at issue, not that of its officers, and in the absence of an immunity, any recovery would come from public funds.

municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis. In particular, they were routinely sued in both federal and state courts. See 436 U. S., at 687–688. Cf. *Cowles* v. *Mercer County*, 7 Wall. 118 (1869). Local governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations, as well as for common-law actions for breach of contract.[19] And although, as we discuss below,[20] a municipal-

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[19] Primary among the constitutional suits heard in federal court were those based on a municipality's violation of the Contract Clause, and the courts' enforcement efforts often included "various forms of 'positive' relief, such as ordering that taxes be levied and collected to discharge federal-court judgments, once a constitutional infraction was found." *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 681. Damages actions against municipalities for federal statutory violations were also entertained. See, *e. g.*, *Levy Court* v. *Coroner*, 2 Wall. 501 (1865); *Corporation of New York* v. *Ransom*, 23 How. 487 (1860); *Bliss* v. *Brooklyn*, 3 F. Cas. 706 (No. 1,544) (CC EDNY 1871). In addition, state constitutions and statutes, as well as municipal charters, imposed many obligations upon the local governments, the violation of which typically gave rise to damages actions against the city. See generally Note, Streets, Change of Grade, Liability of Cities for, 30 Am. St. Rep. 835 (1893), and cases cited therein. With respect to authorized contracts—and even unauthorized contracts that are later ratified by the corporation—municipalities were liable in the same manner as individuals for their breaches. See generally 1 J. Dillon, Law of Municipal Corporations §§ 385, 394 (2d ed. 1873) (hereinafter Dillon). Of particular relevance to the instant case, included within the class of contract actions brought against a city were those for the wrongful discharge of a municipal employee, and where the claim was adjudged meritorious, damages in the nature of backpay were regularly awarded. See, *e. g.*, *Richardson* v. *School Dist. No. 10*, 38 Vt. 602 (1866); *Paul* v. *School Dist. No. 2*, 28 Vt. 575 (1856); *Inhabitants of Searsmont* v. *Farwell*, 3 Me. *450 (1825); see generally F. Burke, A Treatise on the Law of Public Schools 81–85 (1880). The most frequently litigated "breach of contract" suits, however, at least in federal court, were those for failure to pay interest on municipal bonds. See, *e. g.*, *The Supervisors* v. *Durant*, 9 Wall. 415 (1870); *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539 (1859).

[20] See *infra*, at 644–650.

ity was not subject to suit for all manner of tortious conduct, it is clear that at the time § 1983 was enacted, local governmental bodies did not enjoy the sort of "good-faith" qualified immunity extended to them by the Court of Appeals.

As a general rule, it was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals:

> "There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action. A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation." T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 120, p. 139 (1869) (hereinafter Shearman & Redfield).

Accord, 2 Dillon § 764, at 875 ("But as respects *municipal corporations proper*, . . . it is, we think, universally considered, even in the absence of statute giving the action, that they are liable for acts of *misfeasance* positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties") (emphasis in original). See 18 E. McQuillin, Municipal Corporations § 53.02 (3d rev. ed. 1977) (hereinafter McQuillin). Under this general theory of liability, a municipality was deemed responsible for any private losses generated through a wide variety of its operations and functions, from personal injuries due to its defective sewers, thoroughfares, and public utilities, to property damage caused by its trespasses and uncompensated takings.[21]

[21] See generally C. Rhyne, Municipal Law 729–789 (1957); Shearman &

Yet in the hundreds of cases from that era awarding damages against municipal governments for wrongs committed by them, one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers. Indeed, where the issue was discussed at all, the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful. In the leading case of *Thayer* v. *Boston*, 36 Mass. 511, 515–516 (1837), for example, Chief Justice Shaw explained:

> "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done."

The *Thayer* principle was later reiterated by courts in several jurisdictions, and numerous decisions awarded damages against municipalities for violations expressly found to have been committed in good faith. See, *e. g.*, *Town Council of Akron* v. *McComb*, 18 Ohio 229, 230–231 (1849); *Horton* v. *Inhabitants of Ipswich*, 66 Mass. 488, 489, 492 (1853); *Elliot* v. *Concord*, 27 N. H. 204 (1853); *Hurley* v. *Town of Texas*, 20 Wis. 634, 637–638 (1866); *Lee* v. *Village of Sandy Hill*, 40 N. Y.

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Redfield §§ 143–152; W. Williams, Liability of Municipal Corporations for Tort (1901) (hereinafter Williams).

442, 448–451 (1869); *Billings* v. *Worcester*, 102 Mass. 329, 332–333 (1869); *Squiers* v. *Village of Neenah*, 24 Wis. 588, 593 (1869); *Hawks* v. *Charlemont*, 107 Mass. 414, 417–418 (1871).[22]

That municipal corporations were commonly held liable for damages in tort was also recognized by the 42d Congress. See *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 688. For example, Senator Stevenson, in opposing the Sherman amendment's creation of a municipal liability for the riotous acts of its inhabitants, stated the prevailing law: "Numberless cases are to be found where a statutory liability has been created against municipal corporations for injuries resulting from a neglect of corporate duty." Cong.

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[22] Accord, *Bunker* v. *City of Hudson*, 122 Wis. 43, 54, 99 N. W. 448, 452 (1904); *Oklahoma City* v. *Hill Bros.*, 6 Okla. 114, 137–139, 50 P. 242, 249–250 (1897); *Schussler* v. *Board of Comm'rs of Hennepin County*, 67 Minn. 412, 417, 70 N. W. 6, 7 (1897); *McGraw* v. *Town of Marion*, 98 Ky. 673, 680–683, 34 S. W. 18, 20–21 (1896). See generally Note, Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents, 30 Am. St. Rep. 376, 405–411 (1893).

Even in England, where the doctrine of official immunity followed by the American courts was first established, no immunity was granted where the damages award was to come from the public treasury. As Baron Bramwell stated in *Ruck* v. *Williams*, 3 H. & N. 308, 320, 157 Eng. Rep. 488, 493 (Exch. 1858):

"I can well understand if a person undertakes the office or duty of a Commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that, if one of several Commissioners does something not within the scope of his authority, the Commissioners as a body are not liable. But where Commissioners, who are a quasi corporate body, are not affected [*i. e.*, personally] by the result of an action, inasmuch as they are authorized by act of parliament to raise a fund for payment of the damages, on what principle is it that, if an individual member of the public suffers from an act bona fide but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

See generally Shearman & Redfield §§ 133, 178.

Globe, 42d Cong., 1st Sess., 762 (hereinafter Globe).[23] Nowhere in the debates, however, is there a suggestion that the common law excused a city from liability on account of the good faith of its authorized agents, much less an indication of a congressional intent to incorporate such an immunity into the Civil Rights Act.[24] The absence of any allusion to a municipal immunity assumes added significance in light of the objections raised by the opponents of § 1 of the Act that its unqualified language could be interpreted to abolish the traditional good-faith immunities enjoyed by legislators, judges, governors, sheriffs, and other public officers.[25] Had

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[23] Senator Stevenson proceeded to read from the decision in *Prather* v. *Lexington*, 52 Ky. 559, 560–562 (1852):

"Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual. But as a general rule a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office; to render it liable it must appear that it expressly authorized the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation, on the subject to which they relate. (*Thayer* v. *Boston*, 19 Pick., 511.) It has also been held that cities are responsible to the same extent, and in the same manner, as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit." Globe 762.

[24] At one point in the debates, Senator Stevenson did protest that the Sherman amendment would, for the first time, "create a corporate liability for personal injury which no prudence or foresight could have prevented." *Ibid.* As his later remarks made clear, however, Stevenson's objection went only to the novelty of the amendment's creation of vicarious municipal liability for the unlawful acts of private individuals, "even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it." *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 692–693, n. 57.

[25] See, *e. g.*, Globe 365 (remarks of Rep. Arthur) ("But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath,

there been a similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the specter of its destruction, as well.

To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability. The first sought to distinguish between a municipality's "governmental" and "proprietary" functions; as to the former, the city was held immune, whereas in its exercise of the latter, the city was held to the same standards of liability as any private corporation. The second doctrine immunized a municipality for its "discretionary" or "legislative" activities, but not for those which were "ministerial" in nature. A brief examination of the application and the rationale underlying each of these doctrines demonstrates that Congress could not have intended them to limit a municipality's liability under § 1983.

The governmental-proprietary distinction [26] owed its existence to the dual nature of the municipal corporation. On

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though as pure in duty as a saint and as immaculate as a seraph, for a mere error in judgment, they are liable. . ."); *id.*, at 385 (remarks of Rep. Lewis); Globe App. 217 (remarks of Sen. Thurman).

[26] In actuality, the distinction between a municipality's governmental and proprietary functions is better characterized not as a line, but as a succession of points. In efforts to avoid the often-harsh results occasioned by a literal application of the test, courts frequently created highly artificial and elusive distinctions of their own. The result was that the very same activity might be considered "governmental" in one jurisdiction, and "proprietary" in another. See 18 McQuillin § 53.02, at 105. See also W. Prosser, Law of Torts § 131, p. 979 (4th ed. 1971) (hereinafter Prosser). As this Court stated, in reference to the " 'nongovernmental'-'governmental' quagmire that has long plagued the law of municipal corporations": "A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." *Indian Towing Co.* v. *United States*, 350 U. S. 61, 65 (1955) (on rehearing).

the one hand, the municipality was a corporate body, capable of performing the same "proprietary" functions as any private corporation, and liable for its torts in the same manner and to the same extent, as well. On the other hand, the municipality was an arm of the State, and when acting in that "governmental" or "public" capacity, it shared the immunity traditionally accorded the sovereign.[27] But the principle of sovereign immunity—itself a somewhat arid fountainhead for municipal immunity[28]—is necessarily nullified when the

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[27] "While acting in their governmental capacity, municipal corporations proper are given the benefit of that same rule which is applied to the sovereign power itself, and are afforded complete immunity from civil responsibility for acts done or omitted, unless such responsibility is expressly created by statute. When, however, they are not acting in the exercise of their purely governmental functions, but are performing duties that pertain to the exercise of those private franchises, powers, and privileges which belong to them for their own corporate benefit, or are dealing with property held by them for their own corporate gain or emolument, then a different rule of liability is applied and they are generally held responsible for injuries arising from their negligent acts or their omissions to the same extent as a private corporation under like circumstances." Williams § 4, at 9. See generally 18 McQuillin §§ 53.02, 53.04, 53.24; Prosser § 131, at 977–983; James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 611–612, 622–629 (1955).

[28] Although it has never been understood how the doctrine of sovereign immunity came to be adopted in the American democracy, it apparently stems from the personal immunity of the English Monarch as expressed in the maxim, "The King can do no wrong." It has been suggested, however, that the meaning traditionally ascribed to this phrase is an ironic perversion of its original intent: "The maxim merely meant that the King was not privileged to do wrong. If his acts were against the law, they were *injuriae* (wrongs). Bracton, while ambiguous in his several statements as to the relation between the King and the law, did not intend to convey the idea that he was incapable of committing a legal wrong." Borchard, Government Liability in Tort, 34 Yale L. J. 1, 2, n. 2 (1924). See also Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act, 45 S. Cal. L. Rev. 131, 142 (1972).

In this country, "[t]he sovereign or governmental immunity doctrine, holding that the state, its subdivisions and municipal entities, may not be

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State expressly or impliedly allows itself, or its creation, to be sued. Municipalities were therefore liable not only for their "proprietary" acts, but also for those "governmental" functions as to which the State had withdrawn their immunity. And, by the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city's immunity from liability for the nonperformance or misperformance of its obligation. See, *e. g.*, *Weightman* v. *The Corporation of Washington*, 1 Black 39, 50–52 (1862); *Providence* v. *Clapp*, 17 How. 161, 167–169 (1855). See generally Shearman & Redfield §§ 122–126; Note, Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents, 30 Am. St. Rep. 376, 385 (1893). Thus, despite the nominal existence of an immunity for "governmental" functions, municipalities were found

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held liable for tortious acts, was never completely accepted by the courts, its underlying principle being deemed contrary to the basic concept of the law of torts that liability follows negligence, as well as foreign to the spirit of the constitutional guarantee that every person is entitled to a legal remedy for injuries he may receive in his person or property. As a result, the trend of judicial decisions was always to restrict, rather than to expand, the doctrine of municipal immunity." 18 McQuillin § 53.02, at 104 (footnotes omitted). See also Prosser § 131, at 984 ("For well over a century the immunity of both the state and the local governments for their torts has been subjected to vigorous criticism, which at length has begun to have its effect"). The seminal opinion of the Florida Supreme Court in *Hargrove* v. *Town of Cocoa Beach*, 96 So. 2d 130 (1957), has spawned "a minor avalanche of decisions repudiating municipal immunity," Prosser § 131, at 985, which, in conjunction with legislative abrogation of sovereign immunity, has resulted in the consequence that only a handful of States still cling to the old common-law rule of immunity for governmental functions. See K. Davis, Administrative Law of the Seventies § 25.00 (1976 and Supp. 1977) (only two States adhere to the traditional common-law immunity from torts in the exercise of governmental functions); Harley & Wasinger, Government Immunity: Despotic Mantle or Creature of Necessity, 16 Washburn L. J. 12, 34–53 (1976).

liable in damages in a multitude of cases involving such activities.

That the municipality's common-law immunity for "governmental" functions derives from the principle of sovereign immunity also explains why that doctrine could not have served as the basis for the qualified privilege respondent city claims under § 1983. First, because sovereign immunity insulates the municipality from unconsented suits altogether, the presence or absence of good faith is simply irrelevant. The critical issue is whether injury occurred while the city was exercising governmental, as opposed to proprietary, powers or obligations—not whether its agents reasonably believed they were acting lawfully in so conducting themselves.[29] More fundamentally, however, the municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law[30]—abolished whatever ves-

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[29] The common-law immunity for governmental functions is thus more comparable to an absolute immunity from liability for conduct of a certain character, which defeats a suit at the outset, than to a qualified immunity, which "depends upon the circumstances and motivations of [the official's] actions, as established by the evidence at trial." *Imbler* v. *Pachtman*, 424 U. S. 409, 419, n. 13 (1976).

[30] Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law. See *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 455–456 (1976); *Hampton* v. *Chicago*, 484 F. 2d 602, 607 (CA7 1973) (Stevens, J.) ("Conduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced").

tige of the State's sovereign immunity the municipality possessed.

The second common-law distinction between municipal functions—that protecting the city from suits challenging "discretionary" decisions—was grounded not on the principle of sovereign immunity, but on a concern for separation of powers. A large part of the municipality's responsibilities involved broad discretionary decisions on issues of public policy—decisions that affected large numbers of persons and called for a delicate balancing of competing considerations. For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government. See *Johnson* v. *State*, 69 Cal. 2d 782, 794, n. 8, 447 P. 2d 352, 361, n. 8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government"). In order to ensure against any invasion into the legitimate sphere of the municipality's policymaking processes, courts therefore refused to entertain suits against the city "either for the non-exercise of, or for the manner in which in good faith it exercises, *discretionary powers* of a public or legislative character." 2 Dillon § 753, at 862.[31]

Although many, if not all, of a municipality's activities would seem to involve at least some measure of discretion, the influence of this doctrine on the city's liability was not as significant as might be expected. For just as the courts

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[31] See generally 18 McQuillin § 53.04a; Shearman & Redfield §§ 127–130; Williams § 6, at 15–16. Like the governmental/proprietary distinction, a clear line between the municipality's "discretionary" and "ministerial" functions was often hard to discern, a difficulty which has been mirrored in the federal courts' attempts to draw a similar distinction under the Federal Tort Claims Act, 28 U. S. C. § 2680 (a). See generally 3 K. Davis, Administrative Law Treatise § 25.08 (1958 and Supp. 1970).

implied an exception to the municipality's immunity for its "governmental" functions, here, too, a distinction was made that had the effect of subjecting the city to liability for much of its tortious conduct. While the city retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment. See, *e. g., Hill* v. *Boston*, 122 Mass. 344, 358–359 (1877) (dicta) (municipality would be immune from liability for damages resulting from its decision where to construct sewers, since that involved a discretionary judgment as to the general public interest; but city would be liable for neglect in the construction or repair of any particular sewer, as such activity is ministerial in nature). See generally C. Rhyne, Municipal Law § 30.4, pp. 736–737 (1957); Williams § 7. Thus municipalities remained liable in damages for a broad range of conduct implementing their discretionary decisions.

Once again, an understanding of the rationale underlying the common-law immunity for "discretionary" functions explains why that doctrine cannot serve as the foundation for a good-faith immunity under § 1983. That common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. As was stated in *Sterling* v. *Constantin*, 287 U. S. 378, 398 (1932): "When there is a substantial showing that the exertion of state power has

overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

In sum, we can discern no "tradition so well grounded in history and reason" that would warrant the conclusion that in enacting § 1 of the Civil Rights Act, the 42d Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended so to limit the reach of a statute expressly designed to provide a "broad remedy for violations of federally protected civil rights," *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 685, we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep.[32]

## B

Our rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy. The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Monroe* v. *Pape*, 365 U. S., at 184 (quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941)). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those

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[32] Cf. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 336 (2d ed. 1973) ("[W]here constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity . . . in order to defeat them").

who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape, supra,* at 172.

How "uniquely amiss" it would be, therefore, if the government itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct"—were permitted to disavow liability for the injury it has begotten. See *Adickes* v. *Kress & Co.,* 398 U. S. 144, 190 (1970) (opinion of BRENNAN, J.). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, see *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated.[33]

Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. See *Robertson* v. *Wegmann,* 436 U. S. 584, 590–591 (1978); *Carey* v. *Piphus,* 435 U. S. 247, 256–257 (1978). The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create

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[33] The absence of any damages remedy for violations of all but the most "clearly established" constitutional rights, see *Wood* v. *Strickland,* 420 U. S., at 322, could also have the deleterious effect of freezing constitutional law in its current state of development, for without a meaningful remedy aggrieved individuals will have little incentive to seek vindication of those constitutional deprivations that have not previously been clearly defined.

an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.[34] Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.[35] Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. Cf. Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1218–1219 (1977).[36]

Our previous decisions conferring qualified immunities on various government officials, see *supra*, at 637–638, are not to

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[34] For example, given the discussion that preceded the Independence City Council's adoption of the allegedly slanderous resolution impugning petitioner's integrity, see n. 6, *supra*, one must wonder whether this entire litigation would have been necessary had the Council members thought that the city might be liable for their misconduct.

[35] Cf. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418 (1975): "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 379 (CA8 1973)."

[36] In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. The need to institute system-wide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights is, of course, particularly acute where the frontline officers are judgment-proof in their individual capacities.

be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct. Rather, in each case we concluded that overriding considerations of public policy nonetheless demanded that the official be given a measure of protection from personal liability. The concerns that justified those decisions, however, are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue.[37]

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[37] On at least two previous occasions, this Court has expressly recognized that different considerations come into play when governmental rather than personal liability is threatened. *Hutto* v. *Finney*, 437 U. S. 678 (1978), affirmed an award of attorney's fees out of state funds for a deprivation of constitutional rights, holding that such an assessment would not contravene the Eleventh Amendment. In response to the suggestion, adopted by the dissent, that any award should be borne by the government officials personally, the Court noted that such an allocation would not only be "manifestly unfair," but would "def[y] this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to 'exercise their discretion with undue timidity.' *Wood* v. *Strickland*, 420 U. S. 308, 321." *Id.*, at 699, n. 32. The Court thus acknowledged that imposing personal liability on public officials could have an undue chilling effect on the exercise of their decision-making responsibilities, but that no such pernicious consequences were likely to flow from the possibility of a recovery from public funds.

Our decision in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391 (1979), also recognized that the justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself. Petitioners in that case had sought damages under § 1983 from a regional planning agency and the individual members of its governing agency. Relying on *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court concluded that "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U. S., at 406. At the same time, however, we cautioned: "If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests. See *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658." *Id.*, at 405, n. 29.

In *Scheuer* v. *Rhodes, supra,* at 240, THE CHIEF JUSTICE identified the two "mutually dependent rationales" on which the doctrine of official immunity rested:

> "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." [38]

The first consideration is simply not implicated when the damages award comes not from the official's pocket, but from the public treasury. It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. Indeed, Congress enacted § 1983 precisely to provide a remedy for such abuses of official power. See *Monroe* v. *Pape,* 365 U. S., at 171–172. Elemental notions of fairness dictate that one who causes a loss should bear the loss.

It has been argued, however, that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in *Thayer* v. *Boston*—"that the city, in its corporate capacity, should be liable to make good the damage sustained by an [unlucky] indi-

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[38] *Wood* v. *Strickland,* 420 U. S. 308 (1975), mentioned a third justification for extending a qualified immunity to public officials: the fear that the threat of personal liability might deter citizens from holding public office. See *id.,* at 320 ("The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure"). Such fears are totally unwarranted, of course, once the threat of personal liability is eliminated.

vidual, in consequence of the acts thus done." 36 Mass., at 515. After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. See generally 3 K. Davis, Administrative Law Treatise § 25.17 (1958 and Supp. 1970); Prosser § 131, at 978; Michelman, Property, Utility, and Fairness: Some Thoughts on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).[39]

The second rationale mentioned in *Scheuer* also loses its force when it is the municipality, in contrast to the official, whose liability is at issue. At the heart of this justification for a qualified immunity for the individual official is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters

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[39] *Monell* v. *New York City Dept. of Social Services* indicated that the principle of loss-spreading was an insufficient justification for holding the municipality liable under § 1983 on a *respondeat superior* theory. 436 U. S., at 693–694. Here, of course, quite a different situation is presented. Petitioner does not seek to hold the city responsible for the unconstitutional actions of an individual official "*solely* because it employs a tortfeasor." *Id.*, at 691. Rather, liability is predicated on a determination that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*, at 690. In this circumstance—when it is the local government itself that is responsible for the constitutional deprivation—it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual.

of public policy.[40] The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed. First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. See *Kostka* v. *Hogg*, 560 F. 2d 37, 41 (CA1 1977). More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'être*." [41]

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[40] "The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." *Wood* v. *Strickland*, *supra*, at 319–320.

[41] Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1224 (1977). See also *Johnson* v. *State*, 69 Cal. 2d 782, 792–793, 447 P. 2d 352, 359–360 (1968):

"Nor do we deem an employee's concern over the potential liability of his employer, the governmental unit, a justification for an expansive definition of 'discretionary,' and hence immune, acts. As a threshold matter, we consider it unlikely that the possibility of government liability will be

## IV

In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under § 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual "blameworthiness" the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."

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a serious deterrent to the fearless exercise of judgment by the employee. In any event, however, to the extent that such a deterrent effect takes hold, it may be wholesome. An employee in a private enterprise naturally gives some consideration to the potential liability of his employer, and this attention unquestionably promotes careful work; the potential liability of a governmental entity, to the extent that it affects primary conduct at all, will similarly influence public employees." (Citation and footnote omitted.)

*Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 694.

*Reversed.*

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that the city of Independence may be liable in damages for violating a constitutional right that was unknown when the events in this case occurred. It finds a denial of due process in the city's failure to grant petitioner a hearing to clear his name after he was discharged. But his dismissal involved only the proper exercise of discretionary powers according to prevailing constitutional doctrine. The city imposed no stigma on petitioner that would require a "name clearing" hearing under the Due Process Clause.

On the basis of this alleged deprivation of rights, the Court interprets 42 U. S. C. § 1983 to impose strict liability on municipalities for constitutional violations. This strict liability approach inexplicably departs from this Court's prior decisions under § 1983 and runs counter to the concerns of the 42d Congress when it enacted the statute. The Court's ruling also ignores the vast weight of common-law precedent as well as the current state law of municipal immunity. For these reasons, and because this decision will hamper local governments unnecessarily, I dissent.

## I

The Court does not question the District Court's statement of the facts surrounding Owen's dismissal. *Ante*, at 625. It nevertheless rejects the District Court's conclusion that no due process hearing was necessary because "the circumstances of [Owen's] discharge did not impose a stigma of illegal or immoral conduct on his professional reputation." 421 F. Supp. 1110, 1122 (WD Mo. 1976); see *ante*, at 633–634, n. 13.

Careful analysis of the record supports the District Court's view that Owen suffered no constitutional deprivation.

A

From 1967 to 1972, petitioner Owen served as Chief of the Independence Police Department at the pleasure of the City Manager.[1] Friction between Owen and City Manager Alberg flared openly in early 1972, when charges surfaced that the Police Department's property room was mismanaged. The City Manager initiated a full internal investigation.

In early April, the City Auditor reported that the records in the property room were so sparse that he could not conduct an audit. The City Counselor reported that "there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room." 560 F. 2d 925, 928 (CA8 1977). In a telephone call on April 10, the City Manager asked Owen to resign and offered him another position in the Department. The two met on the following day. Alberg expressed his unhappiness over the property room situation and again requested that Owen step down. When Owen refused, the City Manager responded that he would be fired. 421 F. Supp., at 1114–1115.

On April 13, the City Manager asked Lieutenant Cook of the Police Department if he would be willing to take over as Chief. Alberg also released the following statement to the public:

> "At my direction, the City Counselor's office, [i]n conjunction with the City Auditor ha[s] completed a routine audit of the police property room.

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[1] Under § 3.3 (1) of the Independence City Charter in effect in 1972, the City Manager had the power to "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads, of administrative departments. . . ." Section 3.8 of that Charter stated that the Chief of Police is the "director" of the Police Department. Charter of the City of Independence, Mo. (Dec. 5, 1961) (hereinafter cited as Charter).

> "Discrepancies were found in the administration, handling and security of recovered property. There appears to be no evidence to substantiate any allegations of a criminal nature. . . ." 560 F. 2d, at 928–929.

The District Court found that the City Manager decided on Saturday, April 15, to replace Owen with Lieutenant Cook as Chief of Police. 421 F. Supp., at 1115. Before the decision was announced, however, City Council Member Paul Roberts obtained the internal reports on the property room. At the April 17 Council meeting, Roberts read a prepared statement that accused police officials of "gross inefficiencies" and various "inappropriate" actions. *Id.*, at 1116, n. 2. He then moved that the Council release the reports to the public, refer them to the Prosecuting Attorney of Jackson County for presentation to a grand jury, and recommend to the City Manager that he "take all direct and appropriate action permitted under the Charter. . . ." *Ibid.* The Council unanimously approved the resolution.

On April 18, Alberg "implemented his prior decision to discharge [Owen] as Chief of Police." 560 F. 2d, at 929. The notice of termination stated simply that Owen's employment was "[t]erminated under the provisions of Section 3.3 (1) of the City Charter." App. 17. That charter provision grants the City Manager complete authority to remove "directors" of administrative departments "when deemed necessary for the good of the service." Owen's lawyer requested a hearing on his client's termination. The Assistant City Counselor responded that "there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." *Id.*, at 27.

The City Manager referred to the Prosecuting Attorney all reports on the property room. The grand jury returned a "no true bill," and there has been no further official action on the matter. Owen filed a state lawsuit against Councilman

Roberts and City Manager Alberg, asking for damages for libel, slander, and malicious prosecution. Alberg won a dismissal of the state-law claims against him, and Councilman Roberts reached a settlement with Owen.[2]

This federal action was filed in 1976. Owen alleged that he was denied his liberty interest in his professional reputation when he was dismissed without formal charges or a hearing. *Id.*, at 8, 10.[3]

B

Due process requires a hearing on the discharge of a government employee "if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination. . . ." *Codd* v. *Velger*, 429 U. S. 624, 628 (1977) (*per curiam*). This principle was first announced in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), which was decided in June 1972, 10 weeks *after* Owen was discharged. The pivotal question after *Roth* is whether the circumstances of the discharge so blackened the employee's

[2] In its answer to Owen's complaint in this action, the city cited the state-court action as *Owen* v. *Roberts and Alberg*, Case No. 778,640 (Jackson County, Mo., Circuit Ct.). App. 15.

[3] Owen initially claimed that his property interests in the job also were violated. The Court of Appeals affirmed the District Court's rejection of that contention, 560 F. 2d 925, 937 (CA8 1977), and petitioner has not challenged that ruling in this Court.

The Court suggests that the city should have presented a cross-petition for certiorari in order to argue that Owen has no cause of action. *Ante*, at 633, n. 13. It is well settled that a respondent "may make any argument presented below that supports the judgment of the lower court." *Hankerson* v. *North Carolina*, 432 U. S. 233, 240, n. 6 (1977); see *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, 426 U. S. 479, 480–481 (1976), citing *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924). The judgment of the Court of Appeals in the instant case was to "den[y] Owen any relief . . ." by finding that the defendants were immune from suit. 589 F. 2d 335, 338 (1979). Since the same judgment would result from a finding that Owen has no cause of action under the statute, respondents' failure to present a cross-petition does not prevent them from pressing the issue before this Court.

name as to impair his liberty interest in his professional reputation. *Id.*, at 572–575.

The events surrounding Owen's dismissal "were prominently reported in local newspapers." 560 F. 2d, at 930. Doubtless, the public received a negative impression of Owen's abilities and performance. But a "name clearing" hearing is not necessary unless the employer makes a public statement that "might seriously damage [the employee's] standing and associations in his community." *Board of Regents* v. *Roth*, *supra*, at 573. No hearing is required after the "discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." *Bishop* v. *Wood*, 426 U. S. 341, 348 (1976).

The City Manager gave no specific reason for dismissing Owen. Instead, he relied on his discretionary authority to discharge top administrators "for the good of the service." Alberg did not suggest that Owen "had been guilty of dishonesty, or immorality." *Board of Regents* v. *Roth*, *supra*, at 573. Indeed, in his "property room" statement of April 13, Alberg said that there was "no evidence to substantiate any allegations of a criminal nature." This exoneration was reinforced by the grand jury's refusal to initiate a prosecution in the matter. Thus, nothing in the actual firing cast such a stigma on Owen's professional reputation that his liberty was infringed.

The Court does not address directly the question whether any stigma was imposed by the discharge. Rather, it relies on the Court of Appeals' finding that stigma derived from events "connected with" the firing. *Ante*, at 633; 589 F. 2d, at 337. That court attached great significance to the resolution adopted by the City Council at its April 17 meeting. But the resolution merely recommended that Alberg take "appropriate action," and the District Court found no "causal connection" between events in the City Council and the firing of Owen. 421 F. Supp., at 1121. Two days

before the Council met, Alberg already had decided to dismiss Owen. Indeed, Councilman Roberts stated at the meeting that the City Manager had asked for Owen's resignation. *Id.*, at 1116, n. 2.[4]

Even if the Council resolution is viewed as part of the discharge process, Owen has demonstrated no denial of his liberty. Neither the City Manager nor the Council cast any aspersions on Owen's character. Alberg absolved all connected with the property room of any illegal activity, while the Council resolution alleged no wrongdoing. That events focused public attention upon Owen's dismissal is undeniable; such attention is a condition of employment—and of discharge—for high government officials. Nevertheless, nothing in the actions of the City Manager or the City Council triggered a constitutional right to a name-clearing hearing.[5]

The statements by Councilman Roberts were neither measured nor benign, but they provide no basis for this action against the city of Independence. Under *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 691 (1978), the city cannot be held liable for Roberts' statements on a theory of *respondeat superior*. That case held that § 1983

[4] The City Charter prohibits any involvement of Council members in the City Manager's personnel decisions. Section 2.11 of the Charter states that Council members may not "participate in any manner in the appointment or removal of officers and employees of the city." Violation of § 2.11 is a misdemeanor that may be punished by ejection from office.

[5] The Court suggests somewhat cryptically that stigma was imposed on Owen when "the city—through the unanimous resolution of the City Council—released to the public an allegedly false statement impugning petitioner's honesty and integrity." *Ante*, at 633, n. 13. The Court fails, however, to identify any "allegedly false statement." The resolution did call for public disclosure of the reports on the property room situation, but those reports were never released. *Ante*, at 630. Indeed, petitioner's complaint alleged that the failure to release those reports left "a cloud or suspicion of misconduct" over him. App. 8. The resolution also referred the reports to the prosecutor and called on the City Manager to take appropriate action. Neither event could constitute the public release of an "allegedly false statement" mentioned by the Court.

makes municipalities liable for constitutional deprivations only if the challenged action was taken "pursuant to official municipal policy of some nature. . . ." As the Court noted, "a municipality cannot be held liable *solely* because it employs a tortfeasor. . . ." 436 U. S., at 691 (emphasis in original). The statements of a single councilman scarcely rise to the level of municipal policy.[6]

As the District Court concluded, "[a]t most, the circumstances . . . suggested that, as Chief of Police, [Owen] had been an inefficient administrator." 421 F. Supp., at 1122. This Court now finds unconstitutional stigma in the interaction of unobjectionable official acts with the unauthorized statements of a lone councilman who had no direct role in the discharge process. The notoriety that attended Owen's firing resulted not from any city policy, but solely from public misapprehension of the reasons for a purely discretionary dismissal. There was no constitutional injury; there should be no liability.[7]

## II

Having constructed a constitutional deprivation from the valid exercise of governmental authority, the Court holds that municipalities are strictly liable for their constitutional torts. Until two years ago, municipal corporations enjoyed absolute immunity from § 1983 claims. *Monroe* v. *Pape*, 365 U. S.

[6] Roberts himself enjoyed absolute immunity from § 1983 suits for acts taken in his legislative capacity. *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 402–406 (1979). Owen did sue him in state court for libel and slander, and reached an out-of-court settlement. See *supra*, at 660–661.

[7] This case bears some resemblance to *Martinez* v. *California*, 444 U. S. 277 (1980), which involved a § 1983 suit against state parole officials for injuries caused by a paroled prisoner. We found that the plaintiffs had no cause of action because they could not show a causal relationship between their injuries and the actions of the defendants. 444 U. S., at 285. That relationship also is absent in this case. Any injury to Owen's reputation was the result of the Roberts statement, not the policies of the city of Independence.

167 (1961). But *Monell* v. *New York City Dept. of Social Services, supra,* held that local governments are "persons" within the meaning of the statute, and thus are liable in damages for constitutional violations inflicted by municipal policies. 436 U. S., at 690. *Monell* did not address the question whether municipalities might enjoy a qualified immunity or good-faith defense against § 1983 actions. 436 U. S., at 695, 701; *id.*, at 713–714 (POWELL, J., concurring).

After today's decision, municipalities will have gone in two short years from absolute immunity under § 1983 to strict liability. As a policy matter, I believe that strict municipal liability unreasonably subjects local governments to damages judgments for actions that were reasonable when performed. It converts municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable.

The Court's decision also impinges seriously on the prerogatives of municipal entities created and regulated primarily by the States. At the very least, this Court should not initiate a federal intrusion of this magnitude in the absence of explicit congressional action. Yet today's decision is supported by nothing in the text of § 1983. Indeed, it conflicts with the apparent intent of the drafters of the statute, with the common law of municipal tort liability, and with the current state law of municipal immunities.

## A

### 1

Section 1983 provides a private right of action against "[e]very person" acting under color of state law who imposes or causes to be imposed a deprivation of constitutional rights.[8]

[8] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." 42 U. S. C. § 1983.

Although the statute does not refer to immunities, this Court has held that the law "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman*, 424 U. S. 409, 418 (1976); see *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951).

This approach reflects several concerns. First, the common-law traditions of immunity for public officials could not have been repealed by the "general language" of § 1983. *Tenney* v. *Brandhove*, *supra*, at 376; see *Imbler* v. *Pachtman*, *supra*, at 421–424; *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967). In addition, "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U. S. 232, 241 (1974). Because public officials will err at times, "[t]he concept of immunity assumes . . . that it is better to risk some error and possibly injury from such error than not to decide or act at all." *Id.*, at 242; see *Wood* v. *Strickland*, 420 U. S. 308, 319–320 (1975). By granting some immunity to governmental actors, the Court has attempted to ensure that public decisions will not be dominated by fears of liability for actions that may turn out to be unconstitutional. Public officials "cannot be expected to predict the future course of constitutional law. . . ." *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978).

In response to these considerations, the Court has found absolute immunity from § 1983 suits for state legislators, *Tenney* v. *Brandhove*, *supra*, judges, *Pierson* v. *Ray*, *supra*, at 553–555, and prosecutors in their role as advocates for the State, *Imbler* v. *Pachtman*, *supra*. Other officials have been granted a qualified immunity that protects them when in good faith they have implemented policies that reasonably were thought to be constitutional. This limited immunity extends to police officers, *Pierson* v. *Ray*, *supra*, at 555–558, state executive officers, *Scheuer* v. *Rhodes*, *supra*, local school board members, *Wood* v. *Strickland*, *supra*, the super-

intendent of a state hospital, *O'Connor* v. *Donaldson*, 422 U. S. 563, 576–577 (1975), and prison officials, *Procunier* v. *Navarette*, *supra*.

The Court today abandons any attempt to harmonize § 1983 with traditional tort law. It points out that municipal immunity may be abrogated by legislation. Thus, according to the Court, Congress "abolished" municipal immunity when it included municipalities "within the class of 'persons' subject to liability" under § 1983. *Ante*, at 647.

This reasoning flies in the face of our prior decisions under this statute. We have held repeatedly that "immunities 'well grounded in history and reason' [were not] abrogated 'by covert inclusion in the general language' of § 1983." *Imbler* v. *Pachtman*, *supra*, at 418, quoting *Tenney* v. *Brandhove*, *supra*, at 376. See *Scheuer* v. *Rhodes*, *supra*, at 243–244; *Pierson* v. *Ray*, *supra*, at 554. The peculiar nature of the Court's position emerges when the status of executive officers under § 1983 is compared with that of local governments. State and local executives are personally liable for bad-faith or unreasonable constitutional torts. Although Congress had the power to make those individuals liable for all such torts, this Court has refused to find an abrogation of traditional immunity in a statute that does not mention immunities. Yet the Court now views the enactment of § 1983 as a direct abolition of traditional municipal immunities. Unless the Court is overruling its previous immunity decisions, the silence in § 1983 must mean that the 42d Congress mutely accepted the immunity of executive officers, but silently rejected common-law municipal immunity. I find this interpretation of the statute singularly implausible.

2

Important public policies support the extension of qualified immunity to local governments. First, as recognized by the doctrine of separation of powers, some governmental decisions should be at least presumptively insulated from judicial re-

view. Mr. Chief Justice Marshall wrote in *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803), that "[t]he province of the court is . . . not to inquire how the executive, or executive officers, perform duties in which they have a discretion." Marshall stressed the caution with which courts must approach "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive." The allocation of public resources and the operational policies of the government itself are activities that lie peculiarly within the competence of executive and legislative bodies. When charting those policies, a local official should not have to gauge his employer's possible liability under § 1983 if he incorrectly—though reasonably and in good faith—forecasts the course of constitutional law. Excessive judicial intrusion into such decisions can only distort municipal decisionmaking and discredit the courts. Qualified immunity would provide presumptive protection for discretionary acts, while still leaving the municipality liable for bad faith or unreasonable constitutional deprivations.

Because today's decision will inject constant consideration of § 1983 liability into local decisionmaking, it may restrict the independence of local governments and their ability to respond to the needs of their communities. Only this Term, we noted that the "point" of immunity under § 1983 "is to forestall an atmosphere of intimidation that would conflict with [officials'] resolve to perform their designated functions in a principled fashion." *Ferri* v. *Ackerman*, 444 U. S. 193, 203–204 (1979).

The Court now argues that local officials might modify their actions unduly if they face personal liability under § 1983, but that they are unlikely to do so when the locality itself will be held liable. *Ante*, at 655–656. This contention denigrates the sense of responsibility of municipal officers, and misunderstands the political process. Responsible local officials will be concerned about potential judgments against

their municipalities for alleged constitutional torts. Moreover, they will be accountable within the political system for subjecting the municipality to adverse judgments. If officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability. Cf. *Wood* v. *Strickland*, 420 U. S., at 319–320; *Scheuer* v. *Rhodes*, 416 U. S., at 242.[9]

In addition, basic fairness requires a qualified immunity for municipalities. The good-faith defense recognized under § 1983 authorizes liability only when officials acted with malicious intent or when they "knew or should have known that their conduct violated the constitutional norm." *Procunier* v. *Navarette*, 434 U. S., at 562. The standard incorporates the idea that liability should not attach unless there was notice that a constitutional right was at risk. This idea applies to governmental entities and individual officials alike. Constitutional law is what the courts say it is, and—as demonstrated by today's decision and its precursor, *Monell*—even the most prescient lawyer would hesitate to give a firm opinion on matters not plainly settled. Municipalities, often acting in the utmost good faith, may not know or anticipate when their action or inaction will be deemed a constitutional violation.[10]

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[9] The Court's argument is not only unpersuasive, but also is internally inconsistent. The Court contends that strict liability is necessary to "create an incentive for officials . . . to err on the side of protecting citizens' constitutional rights." *Ante*, at 651–652. Yet the Court later assures us that such liability will not distort municipal decisionmaking because "[t]he inhibiting effect is significantly reduced, if not eliminated, . . . when the threat of personal liability is removed." *Ante*, at 656. Thus, the Court apparently believes that strict municipal liability is needed to modify public policies, but will not have any impact on those policies anyway.

[10] The Court implies that unless municipalities are strictly liable under § 1983, constitutional law could be frozen "in its current state of development." *Ante*, at 651, n. 33. I find this a curious notion. This could be the first time that the period between 1961, when *Monroe* declared local

The Court nevertheless suggests that, as a matter of social justice, municipal corporations should be strictly liable even if they could not have known that a particular action would violate the Constitution. After all, the Court urges, local governments can "spread" the costs of any judgment across the local population. *Ante*, at 655. The Court neglects, however, the fact that many local governments lack the resources to withstand substantial unanticipated liability under § 1983. Even enthusiastic proponents of municipal liability have conceded that ruinous judgments under the statute could imperil local governments. *E. g.*, Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 958 (1976).[11] By simplistically applying the theorems of welfare economics and ignoring the reality of municipal finance, the Court imposes strict liability on the level of government least able to bear it.[12] For some municipalities, the result could be a severe limitation on their ability to serve the public.

B

The Court searches at length—and in vain—for legal authority to buttress its policy judgment. Despite its general statements to the contrary, the Court can find no support for its position in the debates on the civil rights legislation that included § 1983. Indeed, the legislative record suggests that

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governments absolutely immune from § 1983 suits, and 1978, when *Monell* overruled *Monroe*, has been described as one of static constitutional standards.

[11] For example, in a recent case in Alaska, a jury awarded almost $500,000 to a policeman who was accused of "racism and brutality" and removed from duty without notice and an opportunity to be heard. *Wayson* v. *City of Fairbanks*, 22 ATLA L. Rep. 222 (Alaska Fourth Dist. Super. Ct. 1979).

[12] Ironically, the State and Federal Governments cannot be held liable for constitutional deprivations. The Federal Government has not waived its sovereign immunity against such claims, and the States are protected by the Eleventh Amendment.

the Members of the 42d Congress would have been dismayed by this ruling. Nor, despite its frequent citation of authorities that are only marginally relevant, can the Court rely on the traditional or current law of municipal tort liability. Both in the 19th century and now, courts and legislatures have recognized the importance of limiting the liability of local governments for official torts. Each of these conventional sources of law points to the need for qualified immunity for local governments.

1

The modern dispute over municipal liability under § 1983 has focused on the defeat of the Sherman amendment during the deliberations on the Civil Rights Act of 1871. *E. g., Monroe* v. *Pape,* 365 U. S., at 187–191; *Monell* v. *New York City Dept. of Social Services,* 436 U. S., at 664–683. Senator Sherman proposed that local governments be held vicariously liable for constitutional deprivations caused by riots within their boundaries. As originally drafted, the measure imposed liability even if municipal officials had no actual knowledge of the impending disturbance.[13] The amendment, which did not affect the part of the Civil Rights Act that we know as § 1983, was approved by the Senate but rejected by the House of Representatives. 436 U. S., at 666. After two revisions by Conference Committees, both Houses passed what is now codified as 42 U. S. C. § 1986. The final version applied not just to local governments but to all "persons," and it imposed no

[13] Cong. Globe, 42d Cong., 1st Sess., 663 (1871). The proposal applied to any property damage or personal injury caused "by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude. . . ." As revised by the first Conference Committee on the Civil Rights Act, the provision still required no showing of notice. *Id.,* at 749.

liability unless the defendant knew that a wrong was "about to be committed." [14]

Because Senator Sherman initially proposed strict municipal liability for constitutional torts, the discussion of his amendment offers an invaluable insight into the attitudes of his colleagues on the question now before the Court. Much of the resistance to the measure flowed from doubts as to Congress' power to impose vicarious liability on local governments. *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 673–683; *id.*, at 706 (POWELL, J., concurring). But opponents of the amendment made additional arguments that strongly support recognition of qualified municipal immunity under § 1983.

First, several legislators expressed trepidation that the proposal's strict liability approach could bankrupt local governments. They warned that liability under the proposal could bring municipalities "to a dead stop." Cong. Globe, 42d Cong., 1st Sess., 763 (1871) (Sen. Casserly). See *id.*, at 762 (Sen. Stevenson); *id.*, at 772 (Sen. Thurman). Representative Bingham argued that municipal liability might be so great under the measure as to deprive a community "of the means of administering justice." *Id.*, at 798. Some Congressmen argued that strict liability would inhibit the effective operation of municipal corporations. The possibility of liability, Representative Kerr insisted, could prevent local officials from exercising "necessary and customary functions." *Id.*, at 789. See *id.*, at 763 (Sen. Casserly); *id.*, at 808 (Rep. Garfield).

[14] The final Conference amendment stated:

"That any person or persons having knowledge that any of the wrongs . . . mentioned in the second section of this act, are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons shall be liable to the person injured or his legal representatives for all damages caused by any such wrongful act. . . ." *Id.*, at 819.

Most significant, the opponents objected to liability imposed without any showing that a municipality knew of an impending constitutional deprivation. Senator Sherman defended this feature of the amendment as a characteristic of riot Acts long in force in England and this country. *Id.*, at 760. But Senator Stevenson argued against creating "a corporate liability for personal injury which no prudence or foresight could have prevented." *Id.*, at 762. In the most thorough critique of the amendment, Senator Thurman carefully reviewed the riot Acts of Maryland and New York. He emphasized that those laws imposed liability only when a plaintiff proved that the local government had both notice of the impending injury and the power to prevent it. *Id.*, at 771.

> "Is not that right? Why make the county, or town, or parish liable when it had no reason whatsoever to anticipate that any such crime was about to be committed, and when it had no knowledge of the commission of the crime until after it was committed? What justice is there in that?" *Ibid.*

These concerns were echoed in the House of Representatives. Representative Kerr complained that "it is not required, before liability shall attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality." *Id.*, at 788. He denounced the "total and absolute absence of notice, constructive or implied, within any decent limits of law or reason," adding that the proposal "takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge, or the possibility of either." *Ibid.* Similarly, Representative Willard argued that liability "is only warranted when the community . . . has proved faithless to its duties. . . ." *Id.*, at 791. He criticized the absence of a requirement that it be "prov[ed] in court that there has been any default, any denial, any neglect on the part of

the county, city, town, or parish to give citizens the full protection of the laws." *Ibid.*

Partly in response to these objections, the amendment as finally enacted conditioned liability on a demonstration that the defendant knew that constitutional rights were about to be denied. Representative Poland introduced the new measure, noting that "any person *who has knowledge* of any of the offenses named . . . shall [have a] duty to use all reasonable diligence within his power to prevent it." *Id.*, at 804 (emphasis supplied). The same point was made by Representative Shellabarger, the sponsor of the entire Act and, with Representative Poland, a member of the Conference Committee that produced the final draft. *Id.*, at 804–805; see *id.*, at 807 (Rep. Garfield).

On the Senate side, one conferee stated that under the final version

> "in order to make the [municipal] corporation liable as a body it must appear in some way to the satisfaction of the jury that the officers of the corporation, those persons whose duty it was to repress tumult, if they could, had reasonable notice of the fact that there was a tumult, or was likely to be one, and neglected to take the necessary means to prevent it." *Id.*, at 821 (Sen. Edmunds).

Senator Sherman disliked the revised provision. He complained that "before you can make [a person] responsible you have got to show that they had knowledge that the specific wrongs upon the particular person were about to be wrought." *Ibid.*[15]

These objections to the Sherman amendment apply with equal force to strict municipal liability under § 1983. Just

[15] Under 42 U. S. C. § 1986, the current version of the language approved in place of the Sherman amendment, liability "is dependent on proof of actual knowledge by a defendant of the wrongful conduct. . . ." *Hampton* v. *Chicago*, 484 F. 2d 602, 610 (CA7 1973), cert. denied, 415 U. S. 917 (1974).

as the 42d Congress refused to hold municipalities vicariously liable for deprivations that could not be known beforehand, this Court should not hold those entities strictly liable for deprivations caused by actions that reasonably and in good faith were thought to be legal. The Court's approach today, like the Sherman amendment, could spawn onerous judgments against local governments and distort the decisions of officers who fear municipal liability for their actions. Congress' refusal to impose those burdens in 1871 surely undercuts any historical argument that federal judges should do so now.

The Court declares that its rejection of qualified immunity is "compelled" by the "legislative purpose" in enacting § 1983. *Ante*, at 650. One would expect powerful documentation to back up such a strong statement. Yet the Court notes only three features of the legislative history of the Civil Rights Act. Far from "compelling" the Court's strict liability approach, those features of the congressional record provide scant support for its position.

First, the Court reproduces statements by Congressmen attesting to the broad remedial scope of the law. *Ante*, at 636, and n. 17. In view of our many decisions recognizing the immunity of officers under § 1983, *supra*, at 666–667, those statements plainly shed no light on congressional intent with respect to immunity under the statute. Second, the Court cites Senator Stevenson's remark that frequently "a statutory liability has been created against municipal corporations for injuries resulting from a neglect of corporate duty." *Ante*, at 642–643, citing Cong. Globe, 42d Cong., 1st Sess., 762 (1871). The Senator merely stated the unobjectionable proposition that municipal immunity could be qualified or abolished by statute. This fragmentary observation provides no basis for the Court's version of the legislative history.

Finally, the Court emphasizes the lack of comment on municipal immunity when opponents of the bill did discuss the immunities of government officers. "Had there been a

similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the spectre of its destruction, as well." *Ante,* at 643–644. This is but another example of the Court's continuing willingness to find meaning in silence. This example is particularly noteworthy because the very next sentence in the Court's opinion concedes: "To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability." *Ante,* at 644. Since the opponents of the Sherman amendment repeatedly expressed their conviction that strict municipal liability was unprecedented and unwise, the failure to recite the theories of municipal immunity is of no relevance here. In any event, that silence cannot contradict the many contemporary judicial decisions applying that immunity. See *infra,* at 677–678, and nn. 16, 17.

2

The Court's decision also runs counter to the common law in the 19th century, which recognized substantial tort immunity for municipal actions. *E. g.,* 2 J. Dillon, Law of Municipal Corporations §§ 753, 764, pp. 862–863, 875–876 (2d ed. 1873); W. Williams, Liability of Municipal Corporations for Tort 9, 16 (1901). Nineteenth-century courts generally held that municipal corporations were not liable for acts undertaken in their "governmental," as opposed to their "proprietary," capacity.[16] Most States now use other criteria

[16] In the leading case of *Bailey* v. *Mayor &c. of the City of New York,* 3 Hill 531, 539 (N. Y. 1842), the court distinguished between municipal powers "conferred for the benefit of the public" and those "made as well for the private emolument and advantage of the city. . . ." Because the injury in *Bailey* was caused by a water utility maintained for the exclusive benefit of the residents of New York City, the court found the municipality liable "as a private company." *Ibid.* This distinction was construed to provide local governments with immunity in actions alleging inadequate police protection, *Western College of Homeopathic Medicine* v. *Cleveland,* 12 Ohio St. 375 (1861), improper sewer construction, *Child* v.

for determining when a local government should be liable for damages. See *infra*, at 681–683. Still, the governmental/proprietary distinction retains significance because it was so widely accepted when § 1983 was enacted. It is inconceivable that a Congress thoroughly versed in current legal doctrines, see *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 669, would have intended through silence to create the strict liability regime now imagined by this Court.

More directly relevant to this case is the common-law distinction between the "discretionary" and "ministerial" duties of local governments. This Court wrote in *Harris* v. *District of Columbia*, 256 U. S. 650, 652 (1921): "[W]hen acting in good faith municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character." See *Weightman* v. *The Corporation of Washington*, 1 Black 39, 49–50 (1862). The rationale for this immunity derives from the theory of separation of powers. In *Carr* v. *The Northern Liberties*, 35 Pa. 324, 329 (1860), the Pennsylvania Supreme Court explained why a local government was immune from recovery for damage caused by an inadequate town drainage plan.

> "[H]ow careful we must be that courts and juries do not encroach upon the functions committed to other public officers. It belongs to the province of town councils to direct the drainage of our towns, according to the best of their means and discretion, and we cannot directly or indirectly control them in either. No law allows us to substitute the judgment of a jury . . . for that of the representatives of the town itself, to whom the business is especially committed by law."

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*Boston*, 86 Mass. 41 (1862), negligent highway maintenance, *Hewison* v. *New Haven*, 37 Conn. 475 (1871), and unsafe school buildings, *Hill* v. *Boston*, 122 Mass. 344 (1877).

That reasoning, frequently applied in the 19th century,[17] parallels the theory behind qualified immunity under § 1983. This Court has recognized the importance of preserving the autonomy of executive bodies entrusted with discretionary powers. *Scheuer* v. *Rhodes* held that executive officials who have broad responsibilities must enjoy a "range of discretion [that is] comparably broad." 416 U. S., at 247. Consequently, the immunity available under § 1983 varies directly with "the scope of discretion and responsibilities of the office. . . ." 416 U. S., at 247. Strict municipal liability can only undermine that discretion.[18]

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[17] *E. g., Goodrich* v. *Chicago*, 20 Ill. 445 (1858); *Logansport* v. *Wright*, 25 Ind. 512 (1865); *Mills* v. *Brooklyn*, 32 N. Y. 489, 498–499 (1865); *Wilson* v. *Mayor &c. of City of New York*, 1 Denio 595, 600–601 (N. Y. 1845); *Wheeler* v. *Cincinnati*, 19 Ohio St. 19 (1869) (*per curiam*); *Richmond* v. *Long's Adm'rs*, 17 Gratt. 375 (Va. 1867); *Kelley* v. *Milwaukee*, 18 Wis. 83 (1864).

[18] The Court cannot wish away these extensive municipal immunities. It quotes two 19th-century treatises as referring to municipal liability for some torts. *Ante*, at 640. Both passages, however, refer to exceptions to the existing immunity rules. The first treatise cited by the Court concedes, though deplores, the fact that many jurisdictions embraced the governmental/proprietary distinction. T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 120, pp. 140–141 (1869). The same volume notes that local governments could not be sued for injury caused by discretionary acts, *id.*, § 127, at 154, or for officers' acts beyond the powers of the municipal corporation, *id.*, § 140, at 169. The Court's quotation from Dillon on Municipal Corporations stops just before that writer acknowledges that local governments are liable only for injury caused by nondiscretionary acts involving "corporate duties." 2 J. Dillon, Law of Municipal Corporations § 764, p. 875 (2d ed. 1873). That writer's full statement of municipal tort liability recognizes immunity for both governmental and discretionary acts. Dillon observes that municipal corporations may be held liable only *"where a duty is a corporate one,* that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, *and is absolute and perfect,* and not discretionary or judicial in its nature. . . ." *Id.*, § 778, at 891 (emphasis in original).

The Court takes some solace in the absence in the 19th century of a

The lack of support for the Court's view of the common law is evident in its reliance on *Thayer* v. *Boston*, 36 Mass. 511 (1837), as its principal authority. *Ante*, at 641–642. *Thayer* did hold broadly that a city could be liable for the authorized acts of its officers. 36 Mass., at 516. But *Thayer* was limited severely by later Massachusetts decisions. *Bigelow* v. *Inhabitants of Randolph*, 80 Mass. 541, 544–545 (1860), ruled that *Thayer* applied only to situations involving official malfeasance—or wrongful, bad-faith actions—not to actions based on neglect or nonfeasance. See *Child* v. *Boston*, 86 Mass. 41 (1862); *Buttrick* v. *Lowell*, 83 Mass. 172 (1861). Finally, *Hill* v. *Boston*, 122 Mass. 344, 359 (1877), squarely repudiated the broad holding of *Thayer* and limited municipal liability to acts performed in the proprietary interest of the municipality.[19]

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qualified immunity for local governments. *Ante*, at 644–650. That absence, of course, was due to the availability of absolute immunity for governmental and discretionary acts. There is no justification for discovering strict municipal liability in § 1983 when that statute was enacted against a background of extensive municipal immunity.

The Court also points out that municipalities were subject to suit for some statutory violations and neglect of contractual obligations imposed by State or Federal Constitutions. *Ante*, at 639–640. That amenability to suit is simply irrelevant to the immunity available in tort actions, which controls the immunity available under § 1983.

[19] The Court cites eight cases decided before 1871 as "reiterat[ing]" the principle announced in *Thayer* while awarding damages against municipalities for good-faith torts. Three of those cases involved the "special and peculiar" statutory liability of New England towns for highway maintenance, and are wholly irrelevant to the Court's argument. *Billings* v. *Worcester*, 102 Mass. 329, 332–333 (1869); *Horton* v. *Inhabitants of Ipswich*, 66 Mass. 488, 491 (1853) (trial court "read to the jury the provisions of the statutes prescribing the duties of towns to keep roads safe . . . and giving a remedy for injuries received from defects in highways"); *Elliot* v. *Concord*, 27 N. H. 204 (1853) (citing similar statute); see 2 J. Dillon, Law of Municipal Corporations § 1000, pp. 1013–1015, and n. 2 (3d ed. 1881). A fourth case, *Town Council of Akron* v. *McComb*, 18 Ohio 229 (1849), concerned damages caused by street-grading, and was later expressly restricted to those facts. *Western College of Homeopathic*

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Today's decision also conflicts with the current law in 44 States and the District of Columbia. All of those jurisdictions provide municipal immunity at least analogous to a "good faith" defense against liability for constitutional torts. Thus, for municipalities in almost 90% of our jurisdictions, the Court creates broader liability for constitutional deprivations than for state-law torts.

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*Medicine* v. *Cleveland*, 12 Ohio St., at 378–379. Two of the other cases cited by the Court involved the performance of ministerial acts that were widely recognized as giving rise to municipal liability. *Lee* v. *Village of Sandy Hill*, 40 N. Y. 442, 451 (1869) (liability for damage caused by street-opening when city was under a "duty" to open that street); *Hurley* v. *Town of Texas*, 20 Wis. 634 (1866) (improper tax collection). The seventh case presented malfeasance, or bad-faith acts, by the municipality's agents. *Hawks* v. *Inhabitants of Charlemont*, 107 Mass. 414 (1871) (city took material from plaintiff's land to repair bridge). Thus, despite any discussion of *Thayer* in the court opinions, seven of the eight decisions noted by the Court involved thoroughly unremarkable exceptions to municipal immunity as provided by statute or common law. They do not buttress the Court's theory of strict liability.

The Court also notes that Senator Stevenson mentioned *Thayer* during the debates on the Sherman amendment. *Ante*, at 642, and nn. 23, 24. That reference, however, came during a speech denouncing the Sherman amendment for imposing tort liability on municipal corporations. To reinforce his contention, Senator Stevenson read from the decision in *Prather* v. *Lexington*, 52 Ky. 559, 560–652 (1852), which cited *Thayer* for the general proposition that a municipal corporation is not liable on a *respondeat superior* basis for the unauthorized acts of its officers. Cong. Globe, 42d Cong., 1st Sess., 762 (1871). But the point of the passage in *Prather* read by Senator Stevenson—and the holding of that case—was that "no principle of law . . . subjects a municipal corporation to a responsibility for the safety of the property within its territorial limits." Cong. Globe, *supra*, quoting *Prather*, *supra*, at 561. So Stevenson cited *Prather* to demonstrate that municipalities should not be held vicariously liable for injuries caused within their boundaries. *Prather*, in turn, cited *Thayer* for a subsidiary point. Nowhere in this sequence is there any support for the Court's idea that local governments should be subjected to strict liability under § 1983.

Twelve States have laws creating municipal tort liability but barring damages for injuries caused by discretionary decisions or by the good-faith execution of a validly enacted, though unconstitutional, regulation.[20] Municipalities in those States have precisely the form of qualified immunity that this Court has granted to executive officials under § 1983. Another 11 States provide even broader immunity for local governments. Five of those have retained the governmental/proprietary distinction,[21] while Arkansas and South Dakota grant even broader protection for municipal corporations.[22] Statutes in four more States protect local governments from tort liability except for particular injuries not relevant to this case, such as those due to motor vehicle accidents or negligent maintenance of public facilities.[23] In

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[20] Idaho Code § 6-904 (1) (1979); Ill. Rev. Stat., ch. 85, §§ 2-103, 2-109, 2-201, 2-203 (1977); Ind. Code §§ 34-4-16.5-3 (6), (8) (1976); 1979 Kan. Sess. Laws, ch. 186, § 4 (including specific exceptions to immunity); Mass. Gen. Laws Ann., ch. 258, §§ 10 (a), (b) (West Supp. 1979); Minn. Stat. §§ 466.03 (5), (6) (1978); Mont. Code Ann. §§ 2-9-103, 2-9-111, 2-9-112 (1979); Neb. Rev. Stat. §§ 23-2409 (1), (2) (1977); Nev. Rev. Stat. § 41.032 (1977); N. D. Cent. Code § 32-12.1-03 (3) (Supp. 1979); Okla. Stat., Tit. 51, §§ 155 (1)-(5) (Supp. 1979); Ore. Rev. Stat. §§ 30.265 (3)(c), (f) (1979).

The Federal Tort Claims Act provides a similar exemption for damages suits against the Federal Government. 28 U. S. C. § 2680 (a). The goal of that provision, according to this Court, is to protect this "discretion of the executive or the administrator to act according to one's judgment of the best course. . . ." *Dalehite* v. *United States*, 346 U. S. 15, 34 (1953).

[21] *Mayor and City Council of Baltimore* v. *Seidel*, 44 Md. App. 465, 409 A. 2d 747 (1980); Mich. Comp. Laws § 691.1407 (1970); *Parks* v. *Long Beach*, 372 So. 2d 253, 253-254 (Miss. 1979); *Haas* v. *Hayslip*, 51 Ohio St. 2d 135, 139, 364 N. E. 2d 1376, 1379 (1977); *Virginia Electric & Power Co.* v. *Hampton Redevelopment & Housing Authority*, 217 Va. 30, 34, 225 S. E. 2d 364, 368 (1976).

[22] Ark. Stat. Ann. § 12-2901 (1979); *Shaw* v. *Mission*, 88 S. D. 564, 225 N. W. 2d 593 (1975).

[23] 1977 N. M. Laws, ch. 386, §§ 4-9; Pa. Stat. Ann., Tit. 53, § 5311.202 (b) (Purdon Supp. 1979-1980); *Wright* v. *North Charleston*, 271 S. C.

Iowa, local governments are not liable for injuries caused by the execution with due care of any "officially enacted" statute or regulation.[24]

Sixteen States and the District of Columbia follow the traditional rule against recovery for damages imposed by discretionary decisions that are confided to particular officers or organs of government.[25] Indeed, the leading commentators on governmental tort liability have noted both the appropriateness and general acceptance of municipal immunity for discretionary acts. See Restatement (Second) of Torts § 895C (2) and Comment *g* (1979); K. Davis, Administrative Law of the Seventies § 25.13 (1976); W. Prosser, Law of Torts 986–987 (4th ed. 1971). In four States, local governments enjoy complete immunity from tort actions unless they have taken out liability insurance.[26] Only five States

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515, 516–518, 248 S. E. 2d 480, 481–482 (1978), see S. C. Code §§ 5–7–70, 15–77–230 (1976 and Supp. 1979); 1979 Wyo. Sess. Laws, ch. 157, § 1 (to be codified as Wyo. Stat. §§ 1–39–105 to 112).

[24] Iowa Code § 613A.4 (3) (1979).

[25] Cal. Gov't Code Ann. §§ 815.2, 820.2 (West 1966); *Tango* v. *New Haven*, 173 Conn. 203, 204–205, 377 A. 2d 284, 285 (1977); *Biloon's Electrical Serv., Inc.* v. *Wilmington*, 401 A. 2d 636, 639–640, 643 (Del. Super. 1979); *Spencer* v. *General Hospital of the District of Columbia*, 138 U. S. App. D. C. 48, 53, 425 F. 2d 479, 484 (1969) (en banc); *Commercial Carrier Corp.* v. *Indian River County*, 371 So. 2d 1010, 1020 (Fla. 1979); Ga. Code § 69–302 (1978); *Frankfort Variety, Inc.* v. *Frankfort*, 552 S. W. 2d 653 (Ky. 1977); Me. Rev. Stat. Ann., Tit. 14, § 8103 (2)(C) (Supp. 1965–1979); *Merrill* v. *City of Manchester*, 114 N. H. 722, 729, 332 A. 2d 378, 383 (1974); N. J. Stat. Ann. §§ 59:2–2 (b) and 59:2–3 (West Supp. 1979–1980); *Weiss* v. *Fote*, 7 N. Y. 2d 579, 585–586, 167 N. E. 2d 63, 65–66 (1960); *Calhoun* v. *Providence*, — R. I. —, 390 A. 2d 350, 355–356 (1978); Tenn. Code Ann. § 23–3311 (1) (Supp. 1979); Tex. Rev. Civ. Stat. Ann., Art. 6252–19, § 14 (7) (Vernon 1970); Utah Code Ann. § 63–30–10 (1) (1953); *King* v. *Seattle*, 84 Wash. 2d 239, 246, 525 P. 2d 228, 233 (1974) (en banc); Wis. Stat. § 895.43 (3) (1977).

[26] Colo. Rev. Stat. § 24–10–104 (1973); Mo. Rev. Stat. § 71.185 (1978); N. C. Gen. Stat. § 160A–485 (1976); Vt. Stat. Ann., Tit. 29, § 1403 (1970).

impose the kind of blanket liability constructed by the Court today.[27]

C

The Court turns a blind eye to this overwhelming evidence that municipalities have enjoyed a qualified immunity and to the policy considerations that for the life of this Republic have justified its retention. This disregard of precedent and policy is especially unfortunate because suits under § 1983 typically implicate evolving constitutional standards. A good-faith defense is much more important for those actions than in those involving ordinary tort liability. The duty not to run over a pedestrian with a municipal bus is far less likely to change than is the rule as to what process, if any, is due the busdriver if he claims the right to a hearing after discharge.

The right of a discharged government employee to a "name clearing" hearing was not recognized until our decision in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972). That ruling was handed down 10 weeks after Owen was discharged and 8 weeks after the city denied his request for a hearing. By stripping the city of any immunity, the Court punishes it for failing to predict our decision in *Roth*. As a result, local governments and their officials will face the unnerving prospect of crushing damages judgments whenever a policy valid under current law is later found to be unconstitutional. I can see no justice or wisdom in that outcome.

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[27] Ala. Code § 11-47-190 (1975); *State* v. *Jennings*, 555 P. 2d 248, 251 (Alaska 1976); Ariz. Rev. Stat. Ann. § 11-981 (A)(2) (Supp. 1979-1980); La. Const., Art. 12, § 10 (A); *Long* v. *Weirton*, — W. Va. —, —, 214 S. E. 2d 832, 859 (1975). It is difficult to determine precisely the tort liability rules for local governments in Hawaii.

# WHALEN *v.* UNITED STATES

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 78-5471. Argued November 27, 28, 1979—Decided April 16, 1980

Petitioner was convicted under the District of Columbia Code of the separate statutory offenses of rape and of killing the same victim in the perpetration of the rape. Under the Code, the latter offense is a species of first-degree murder, but the statute, although requiring proof of a killing and of the commission or attempted commission of rape, does not require proof of an intent to kill. Petitioner was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and sentences, rejecting petitioner's contention that his sentence for rape was improper because that offense merged for purposes of punishment with the felony-murder offense, and thus that the imposition of cumulative punishments for the two offenses was contrary to the federal statutes and to the Double Jeopardy Clause of the Fifth Amendment.

*Held:* The Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and that error denied petitioner his right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress. Pp. 686-695.

(a) The customary deference ordinarily afforded by this Court to the District of Columbia Court of Appeals' construction of local federal legislation is inappropriate with respect to the statutes involved in this case, because petitioner's claim under the Double Jeopardy Clause, which protects against multiple punishments for the same offense, cannot be separated entirely from a resolution of the question of statutory construction. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty. Pp. 688-690.

(b) Neither of the provisions of the District of Columbia Code specifying the separate offenses involved here indicates whether Congress authorized consecutive sentences where both statutes have been offended in a single criminal episode. However, another Code section, when construed in light of its history and its evident purpose, indicates

that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense "requires proof of a fact which the other does not." The statute embodies in this respect the rule of statutory construction stated in *Blockburger* v. *United States*, 284 U. S. 299, 304, and, in this case, leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that each provision "requires proof of a fact which the other does not." A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape. Pp. 690–695.

379 A. 2d 1152, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 695. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 696. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 699.

*Silas J. Wasserstrom* argued the cause for petitioner. With him on the briefs were *William J. Mertens* and *W. Gary Kohlman*.

*Deputy Solicitor General Frey* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Allan A. Ryan, Jr., Jerome M. Feit,* and *Elliott Schulder*.

MR. JUSTICE STEWART delivered the opinion of the Court.

After a jury trial, the petitioner was convicted in the Superior Court of the District of Columbia of rape, and of killing the same victim in the perpetration of rape. He was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and the sentences. 379 A. 2d 1152.[1] We brought

[1] The jury also convicted the petitioner of other felonies, but these convictions were set aside by the District of Columbia Court of Appeals, ex-

the case here to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law. 441 U. S. 904.

## I

Under the laws enacted by Congress for the governance of the District of Columbia, rape and killing a human being in the course of any of six specified felonies, including rape, are separate statutory offenses. The latter is a species of first-degree murder, but, as is typical of such "felony murder" offenses, the statute does not require proof of an intent to kill. D. C. Code § 22–2401 (1973). It does require proof of a killing and of the commission or attempted commission of rape or of one of five other specified felonies, in the course of which the killing occurred. *Ibid.* A conviction of first-degree murder is punishable in the District of Columbia by imprisonment for a term of 20 years to life. § 22–2404.[2] Forcible rape of a female is punishable by imprisonment for any term of years or for life. § 22–2801.

It is the petitioner's position that his sentence for the offense of rape must be vacated because that offense merged for purposes of punishment with the felony-murder offense, just as, for example, simple assault is ordinarily held to merge into the offense of assault with a dangerous weapon. See *Waller* v. *United States*, 389 A. 2d 801, 808 (D. C. 1978). The District of Columbia Court of Appeals disagreed, finding that "the societal interests which Congress sought to protect by enactment [of the two statutes] are separate and distinct,"

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cept for a second-degree murder conviction upon which the petitioner had received a concurrent sentence. The sentence itself was vacated by the appellate court.

[2] The statute also provides for a sentence of death upon conviction for first-degree murder, but that provision has been held to be unconstitutional. See *United States* v. *Stokes*, 365 A. 2d 615, 616, n. 4 (D. C. 1976); *United States* v. *Lee*, 160 U. S. App. D. C. 118, 123, 489 F. 2d 1242, 1247 (1973).

and that "nothing in th[e] legislation . . . suggest[s] that Congress intended" the two offenses to merge. 379 A. 2d, at 1159. That construction of the legislation, the petitioner argues, is mistaken, and he further argues that, so construed, the pertinent statutes impose on him multiple punishments for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment. Cf. *North Carolina* v. *Pearce*, 395 U. S. 711.

If this case had come here from a United States court of appeals, we would as a matter of course first decide the petitioner's statutory claim, and, only if that claim were rejected, would we reach the constitutional issue. See *Simpson* v. *United States*, 435 U. S. 6, 11–12. But this case comes from the District of Columbia Court of Appeals, and the statutes in controversy are Acts of Congress applicable only within the District of Columbia. In such cases it has been the practice of the Court to defer to the decisions of the courts of the District of Columbia on matters of exclusively local concern. See *Pernell* v. *Southall Realty*, 416 U. S. 363, 366; see also *Griffin* v. *United States*, 336 U. S. 704, 717–718; *Fisher* v. *United States*, 328 U. S. 463, 476. This practice has stemmed from the fact that Congress, in creating the courts of the District of Columbia and prescribing their jurisdiction, "contemplate[d] that the decisions of the District of Columbia Court of Appeals on matters of local law—both common law and statutory law—will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law." *Pernell* v. *Southall Realty*, 416 U. S., at 368 (footnote omitted).

But it is clear that the approach described in the *Pernell* opinion is a matter of judicial policy, not a matter of judicial power. Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Art. III jurisdiction, and thus we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that we

are barred from reviewing a state court's interpretation of a state statute. *Ibid.* Cf. *Mullaney* v. *Wilbur,* 421 U. S. 684, 691; *Scripto, Inc.* v. *Carson,* 362 U. S. 207, 210; *Murdock* v. *Memphis,* 20 Wall. 590, 632–633.

In this case we have concluded that the customary deference to the District of Columbia Court of Appeals' construction of local federal legislation is inappropriate with respect to the statutes involved, for the reason that the petitioner's claim under the Double Jeopardy Clause cannot be separated entirely from a resolution of the question of statutory construction. The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also "against multiple punishments for the same offense," *North Carolina* v. *Pearce, supra,* at 717 (footnote omitted). But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized. See *Gore* v. *United States,* 357 U. S. 386, 390; *id.,* at 394 (Warren, C. J., dissenting on statutory grounds); *Bell* v. *United States,* 349 U. S. 81, 82; *Ex parte Lange,* 18 Wall. 163, 176; see also *Brown* v. *Ohio,* 432 U. S. 161, 165; *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218; *Blockburger* v. *United States,* 284 U. S. 299; *Ebeling* v. *Morgan,* 237 U. S. 625.

It is not at all uncommon, for example, for Congress or a state legislature to provide that a single criminal offense may be punished both by a monetary fine and by a term of imprisonment. In that situation, it could not be seriously argued that the imposition of both a fine and a prison sentence in accordance with such a provision constituted an impermissible punishment. But if a penal statute instead provided for a fine *or* a term of imprisonment upon conviction, a court could not impose both punishments without running afoul of the double jeopardy guarantee of the Constitution. See *Ex parte Lange, supra,* at 176. Cf. *Bozza* v. *United States,* 330 U. S. 160, 167. In the present case, therefore, if Congress has not authorized

cumulative punishments for rape and for an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced. The dispositive question, therefore, is whether Congress did so provide.

The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress. See *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *United States* v. *Hudson & Goodwin*, 7 Cranch 32, 34.[3] If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.[4]

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[3] This is not to say that there are not constitutional limitations upon this power. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584; *Roe* v. *Wade*, 410 U. S. 113, 164; *Stanley* v. *Georgia*, 394 U. S. 557, 568; *Loving* v. *Virginia*, 388 U. S. 1, 12; *Robinson* v. *California*, 370 U. S. 660, 666–667.

[4] Although the courts of the District of Columbia were created by Congress pursuant to its plenary Art. I power to legislate for the District, see Art. I, § 8, cl. 17; D. C. Code § 11–101 (2) (1973), and are not affected by the salary and tenure provisions of Art. III, those courts, no less than other federal courts, may constitutionally impose only such punishments as Congress has seen fit to authorize.

The Court has held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States. *Dreyer* v. *Illinois*, 187 U. S. 71, 84. See *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 615, and n. 13; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 255; *id.*, at 255, 256–257 (Frankfurter, J., concurring in result). It is possible, therefore, that the Double Jeopardy Clause does not, through the Fourteenth Amendment, circumscribe the penal authority

Because we have concluded that the District of Columbia Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and because that error denied the petitioner his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress, we reverse the judgment of the Court of Appeals.

## II

As has already been noted, rape and the killing of a person in the course of rape in the District of Columbia are separate statutory offenses for which punishments are separately provided. Neither statute, however, indicates whether Congress authorized consecutive sentences where both statutes have been offended in a single criminal episode. Moreover, the legislative history of those specific penal provisions sheds no light on that question.[5] The issue is resolved, however, by an-

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of state courts in the same manner that it limits the power of federal courts. The Due Process Clause of the Fourteenth Amendment, however, would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.

[5] Before 1962, conviction of first-degree murder in the District of Columbia led to a mandatory sentence of death by hanging. See Act of Mar. 3, 1901, § 801, 31 Stat. 1321. Accordingly, the question did not arise whether the sentence for another felony could run consecutively to that for first-degree murder. In 1962 Congress replaced the mandatory death penalty with the present language of D. C. Code § 22–2404 (1973), which allows, as an alternative to a penalty of death, a sentence of 20 years to life imprisonment. Pub. L. 87–423, 76 Stat. 46. Congress did not, however, address the matter of consecutive sentences in this amendatory legislation.

The parties in the present case are in agreement that Congress intended a person convicted of felony murder to be subject to the same penalty as a person convicted of premeditated murder, see, *e. g.*, 108 Cong. Rec. 4128–4129 (1962) (remarks of Sen. Hartke), and subject to more severe punishment than persons convicted of second-degree murder, see S. Rep. No. 373, 87th Cong., 1st Sess., 2 (1961); H. R. Rep. No. 677, 87th Cong., 1st Sess., 2 (1961). The parties disagree as to whether the consecutive sentences in

other statute, enacted in 1970. That statute is § 23–112 of the District of Columbia Code (1973), and it provides as follows:

> "A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) *arises out of the same transaction and requires proof of a fact which the other does not.*" (Emphasis added.)

Although the phrasing of the statute is less than felicitous, the message of the italicized clause, we think, is that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense "requires proof of a fact which the other does not." The clause refers, of course, to a rule of statutory construction stated by this Court in *Blockburger* v. *United States*, 284 U. S. 299, and consistently relied on ever since to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively.[6] The assumption

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this case are in accord with that congressional intent. The petitioner argues that if a consecutive sentence for rape were permitted, he would be punished more severely than if he had committed premeditated murder. The Government counters that the relevant comparison is with the sentences permitted for premeditated murder plus rape, which can be consecutive. Likewise, the Government argues that since consecutive sentences would be permissible for second-degree murder and rape, such sentences should be permitted here to avoid punishing felony murder and rape less harshly. In our view of this case, this controversy need not now be resolved.

[6] The Government would read D. C. Code § 23–112 to mean that courts may ignore the *Blockburger* rule and freely impose consecutive sentences "whether or not" the statutory offenses are different under the rule. While this may be a permissible literal reading of the statute, it would lead to holding that the statute authorizes consecutive sentences for all greater and lesser included offenses—an extraordinary view that the Government

underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent. In the *Blockburger* case the Court held that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, at 304. See also *Brown* v. *Ohio*, 432 U. S., at 166; *Iannelli* v. *United States*, 420 U. S. 770; *Gore* v. *United States*, 357 U. S. 386.

The legislative history rather clearly confirms that Congress intended the federal courts to adhere strictly to the *Blockburger* test when construing the penal provisions of the District of Columbia Code. The House Committee Report expressly disapproved several decisions of the United States Court of Appeals for the District of Columbia Circuit that had not allowed consecutive sentences notwithstanding the fact that the offenses were different under the *Blockburger* test. See H. R. Rep. No. 91–907, p. 114 (1970). The Report restated the general principle that "whether or not consecutive sentences may be imposed depends on the intent of Congress." *Ibid.* But "[s]ince Congress in enacting legislation rarely specifies its intent on this matter, the courts have long adhered to the rule that Congress did intend to permit consecutive sentences . . . when each offense " 'requires proof of a fact which the other does not,' " *ibid.*, citing *Blockburger* v. *United States*, *supra*, and *Gore* v. *United States*, *supra*. The Com-

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itself disavows. Such an improbable construction of the statute would, moreover, be at odds with the evident congressional intention of requiring federal courts to adhere to the *Blockburger* rule in construing the penal provisions of the District of Columbia Code. See *infra*, this page and 693.

mittee Report observed that the United States Court of Appeals had "retreated from this settled principle of law" by requiring specific evidence of congressional intent to allow cumulative punishments, H. R. Rep. No. 91–907, at 114, and the Report concluded as follows:

> "To obviate the need for the courts to search for legislative intent, section 23–112 clearly states the rule for sentencing on offenses arising from the same transaction. For example, a person convicted of entering a house with intent to steal and stealing therefrom shall be sentenced consecutively on the crimes of burglary and larceny unless the judge provides to the contrary."

We think that the only correct way to read § 23–112, in the light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule for construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed "shall, unless the court expressly provides otherwise, run consecutively." [7] And where the offenses are the same under that test, cumulative sentences are not permitted, unless elsewhere specially authorized by Congress.

In this case, resort to the *Blockburger* rule leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that "each provision requires proof of a fact which the other does not." A conviction for

[7] There may be instances in which Congress has not intended cumulative punishments even for offenses that are different under the general provision contained in § 23–112. For example, in this case the District of Columbia Court of Appeals vacated the petitioner's sentence for second-degree murder, for the reason that, in the court's view, second-degree murder is a lesser included offense of first-degree felony murder, notwithstanding the fact that each offense requires proof of an element that the other does not. The correctness of the Court of Appeals' ruling in this regard is not an issue in this case.

killing in the course of a rape cannot be had without proving all the elements of the offense of rape. See *United States* v. *Greene*, 160 U. S. App. D. C. 21, 34, 489 F. 2d 1145, 1158 (1973). Cf. *Harris* v. *Oklahoma*, 433 U. S. 682, 682–683. The Government contends that felony murder and rape are not the "same" offense under *Blockburger*, since the former offense does not in all cases require proof of a rape; that is, D. C. Code § 22–2401 (1973) proscribes the killing of another person in the course of committing rape *or* robbery *or* kidnaping *or* arson, etc. Where the offense to be proved does not include proof of a rape—for example, where the offense is a killing in the perpetration of a robbery—the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger*. In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it.[8] To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity. See *Simpson* v. *United States*, 435 U. S. 6, 14–15; see also n. 10, *infra*.

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[8] Contrary to the view of the dissenting opinion, we do not in this case apply the *Blockburger* rule to the facts alleged in a particular indictment. *Post*, at 708–712. We have simply concluded that, for purposes of imposing cumulative sentences under D. C. Code § 23–112, Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of rape.

Congress is clearly free to fashion exceptions to the rule it chose to enact in § 23–112. A court, just as clearly, is not. Accordingly, notwithstanding the arguments advanced by the Government in favor of imposing consecutive sentences for felony murder and for the underlying felony, we do not speculate about whether Congress, had it considered the matter, might have agreed.[9] It is sufficient for present purposes to observe that a congressional intention to change the general rule of § 23–112 for the circumstances here presented nowhere clearly appears. It would seriously offend the principle of the separation of governmental powers embodied in the Double Jeopardy Clause of the Fifth Amendment if this Court were to fashion a contrary rule with no more to go on than this case provides.[10]

For the foregoing reasons, the judgment of the District of Columbia Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

Because the District of Columbia Court of Appeals did not take account of § 23–112 of the District of Columbia Code, this is one of those exceptional cases in which the judgment of that court is not entitled to the usual deference.

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[9] See n. 5, *supra*.

[10] This view is consistent with the settled rule that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' " *United States* v. *Bass*, 404 U. S. 336, 347, quoting *Rewis* v. *United States*, 401 U. S. 808, 812. See *Simpson* v. *United States*, 435 U. S. 6; *Ladner* v. *United States*, 358 U. S. 169; *Bell* v. *United States*, 349 U. S. 81. As the Court said in the *Ladner* opinion: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 358 U. S., at 178.

*Pernell* v. *Southall Realty*, 416 U. S. 363, 369 (1974). This conclusion, in my opinion, need not rest on any constitutional considerations.

I agree for the reasons given by the Court that in light of § 23–112 and its legislative history, the court below erred in holding that Congress intended to authorize cumulative punishments in this case. But as I see it, the question is one of statutory construction and does not implicate the Double Jeopardy Clause. Had Congress authorized cumulative punishments, as the District of Columbia Court of Appeals held in this case, imposition of such sentences would not violate the Constitution. I agree with MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST in this respect.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the judgment of the Court and much of its opinion. I write separately primarily to state my understanding of the effect, or what should be the effect, of the Court's holding on general double jeopardy principles.

(1) I agree with the Court that it would be inappropriate in this case to accord complete deference to the District of Columbia Court of Appeals' construction of the local legislation at issue. In addition to the reasons offered in the Court's opinion, *ante*, at 688–689, I would point out that the conclusions of the Court of Appeals concerning the intent of Congress in enacting the felony-murder statute were unsupported by appropriate references to the legislative history. Moreover, that court ignored the effect of § 23–112 of the District of Columbia Code, which I have concluded is dispositive of this case. I view the case, therefore, as one falling within the class of " 'exceptional situations where egregious error has been committed.' " *Pernell* v. *Southall Realty*, 416 U. S. 363, 369 (1974), quoting from *Griffin* v. *United States*, 336 U. S. 704, 718 (1949), and *Fisher* v. *United States*, 328 U. S. 463, 476 (1946). Where such an error has been com-

mitted, this Court is barred neither by Art. III nor past practice from overruling the courts of the District of Columbia on a question of local law. *Pernell,* 416 U. S., at 365–369.

(2) I agree with the Court that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Ante,* at 688. I read the opinions cited by the Court in support of that proposition, however, as pronouncing a broader and more significant principle of double jeopardy law. The *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended. It serves, in my considered view, nothing more. "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown* v. *Ohio,* 432 U. S. 161, 165 (1977).[1]

Dicta in recent opinions of this Court at least have suggested, and I now think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch *clearly intended* that multiple penalties be imposed for a single criminal transaction. See *Simpson* v. *United States,* 435 U. S.

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[1] The Court in *Brown* cited the following decisions in support of its observations concerning the role of the Double Jeopardy Clause in multiple punishment cases: *Gore* v. *United States,* 357 U. S. 386 (1958); *Bell* v. *United States,* 349 U. S. 81 (1955); and *Ex parte Lange,* 18 Wall. 163 (1874). See also *Ashe* v. *Swenson,* 397 U. S. 436, 460, n. 14 (1970) (BRENNAN, J., concurring); M. Friedland, Double Jeopardy 205, 212 (1969); Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 112–113, 158–159; Note, Twice in Jeopardy, 75 Yale L. J. 262, 302–313 (1965).

6, 11–13 (1978); *Jeffers* v. *United States*, 432 U. S. 137, 155 (1977) (plurality opinion). I believe that the Court should take the opportunity presented by this case to repudiate those dicta squarely, and to hold clearly that the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. I must concede that the dicta that seemingly support a contrary view have caused confusion among state courts that have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishments.[2]

(3) Finally, I agree with the Court that § 23–112 expresses Congress' intent not to authorize the imposition of consecutive sentences in cases in which the two offenses involved do not each require proof of a fact that the other does not. *Ante*, at 690–693. The question then remains whether the crimes of rape and felony murder based upon that rape each require proof of a fact that the other does not. I would agree that they do not, and for the reasons stated by the Court, *ante*, at 693–694. I hasten to observe, however, that this result turns on a determination of Congress' intent. The Court's holding today surely does not require that the same result automatically be reached in a State where the legislature enacts criminal sanctions clearly authorizing cumulative sentences for a defendant convicted on charges of felony murder and the underlying predicate felony. Nor does this Court's *per curiam* opinion in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977),

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[2] See *People* v. *Hughes*, 85 Mich. App. 674, 272 N. W. 2d 567 (1978); *id.*, at 683–687, 272 N. W. 2d, at 569–571 (Bronson, J., concurring); *id.*, at 687–696, 272 N. W. 2d, at 571–575 (Walsh, J., dissenting); *Ennis* v. *State*, 364 So. 2d 497 (Fla. App. 1978); *id.*, at 500 (Grimes, C. J., concurring); and *State* v. *Frye*, 283 Md. 709, 393 A. 2d 1372 (1978); *id.*, at 725–726, 393 A. 2d, at 1380–1381 (Murphy, C. J., concurring). In each of these state cases, the panels divided on the meaning of this Court's pronouncements respecting the Double Jeopardy Clause's prohibition against multiple punishments. See also cases cited in n. 3, *infra*.

holding that *successive prosecutions* for felony murder and the underlying predicate felony are constitutionally impermissible, require the States to reach an analogous result in a multiple punishments case. Unfortunately, the rather obvious holding in *Harris* and the dictum in *Simpson* have combined to spawn disorder among state appellate courts reviewing challenges similar to the one presented here.[3] I would hope that today's holding will remedy, rather than exacerbate, the existing confusion.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Historians have traced the origins of our constitutional guarantee against double jeopardy back to the days of Demosthenes, who stated that "the laws forbid the same man to be tried twice on the same issue. . . ." 1 Demosthenes 589 (J. Vince trans., 4th ed. 1970). Despite its roots in antiquity, however, this guarantee seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights. This Court has done little to alleviate the confusion, and our opinions, including ones authored by me, are replete with *mea culpa*'s occasioned by shifts in assumptions and emphasis. Compare, *e. g.*, *United States* v. *Jenkins*, 420 U. S. 358 (1975), with *United States* v. *Scott*, 437 U. S. 82 (1978) (overruling *Jenkins*). See also *Burks* v. *United States*, 437 U. S. 1, 9 (1978) (Our

[3] Compare *People* v. *Anderson*, 62 Mich. App. 475, 233 N. W. 2d 620 (1975) (a case in which a state court concluded, based on relevant indicia of legislative intent, that cumulative punishments for armed robbery and a felony murder based upon that robbery were not intended), with *State* v. *Pinder*, 375 So. 2d 836 (Fla. 1979); *State* v. *Frye*, 283 Md. 709, 393 A. 2d 1372 (1978); *State* v. *Innis*, — R. I. —, 391 A. 2d 1158 (1978), cert. granted, 440 U. S. 934 (1979); *Mitchell* v. *State*, 270 Ind. —, 382 N. E. 2d 932 (1978); *Briggs* v. *State*, 573 S. W. 2d 157 (Tenn. 1978) (the latter decisions, erroneously I believe, gave controlling effect to *Harris* in challenges to cumulative punishments for felony murder and the underlying felony).

holdings on this subject "can hardly be characterized as models of consistency and clarity"). Although today's decision takes a tentative step toward recognizing what I believe to be the proper role for this Court in determining the permissibility of multiple punishments, it ultimately compounds the confusion that has plagued us in the double jeopardy area.

I

In recent years we have stated in the manner of "black letter law" that the Double Jeopardy Clause serves three primary purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishments for the same offense. See *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969); *Brown* v. *Ohio*, 432 U. S. 161, 165 (1977). See also *ante*, at 688 (opinion of the Court). Obviously, the scope of each of these three protections turns upon the meaning of the words "same offense," a phrase deceptively simple in appearance but virtually kaleidoscopic in application. Indeed, we have indicated on at least one prior occasion that the meaning of this phrase may vary from context to context, so that two charges considered the same offense so as to preclude prosecution on one charge after an acquittal or conviction on the other need not be considered the same offense so as to bar separate punishments for each charge at a single proceeding. See *Brown* v. *Ohio*, *supra*, at 166–167, n. 6.

In the present case we are asked to decide whether the Double Jeopardy Clause bars the imposition of separate punishments for the crimes of rape and felony murder based on rape. Because the sentences challenged by petitioner were imposed at a single criminal proceeding, this case obviously is not controlled by precedents developed in the context of successive prosecutions. Thus, the Court rightly

eschews reliance upon *Harris* v. *Oklahoma*, 433 U. S. 682 (1977), where we concluded that the crimes of robbery and felony murder predicated on that robbery were similar enough to prevent the State of Oklahoma from prosecuting a person for the former offense after convicting him of the latter offense. See *ante*, at 694 (opinion of the Court). See also *ante*, at 698–699 (BLACKMUN, J., concurring in judgment).

Having determined that this case turns on the permissibility of "multiple punishments" imposed at a single criminal proceeding, the Court takes a tentative step in what I believe to be the right direction by indicating that the "dispositive question" here is whether Congress intended to authorize separate punishments for the two crimes. *Ante*, at 689 (opinion of the Court). As MR. JUSTICE BLACKMUN notes in his concurrence, this Court has not always been so forthright in recognizing that Congress could, if it so desired, authorize cumulative punishments for violation of two separate statutes, whether or not those statutes defined "separate offenses" in some abstract sense. See *ante*, at 698. While we have hinted at this proposition in prior opinions, see, *e. g.*, *Brown* v. *Ohio*, *supra*, at 165; *Gore* v. *United States*, 357 U. S. 386, 394 (1958) (Warren, C. J., dissenting), we have just as often hedged our bets with veiled hints that a legislature might offend the Double Jeopardy Clause by authorizing too many separate punishments for any single "act." See, *e. g.*, *Simpson* v. *United States*, 435 U. S. 6, 11–12 (1978); *Sanabria* v. *United States*, 437 U. S. 54, 69 (1978); *Jeffers* v. *United States*, 432 U. S. 137, 155 (1977) (plurality opinion). To the extent that this latter thesis assumes that any particular criminal transaction is made up of a determinable number of constitutional atoms that the legislature cannot further subdivide into separate offenses, "it demands more of the Double Jeopardy Clause than it is capable of supplying." Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 113. See also Note, Twice in Jeopardy, 75 Yale L. J. 262, 311–313 (1965).

Having come thus far with the Court and the concurrence, I here part company, for it seems clear to me that, if the only question confronting this Court is whether Congress intended to authorize cumulative punishments for rape and for felony murder based upon rape, this Court need decide no constitutional question whatsoever. Axiomatically, we are obligated to avoid constitutional rulings where a statutory ruling would suffice. See *Hagans* v. *Lavine*, 415 U. S. 528, 549 (1974); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). Thus, to the extent that the trial court exceeded its legislative authorization in sentencing petitioner to consecutive sentences for rape and felony murder where Congress intended the offenses to merge, our holding should rest solely on our interpretation of the relevant statutes rather than on vague references to "the principle of the separation of governmental powers embodied in the Double Jeopardy Clause of the Fifth Amendment. . . ." *Ante*, at 695 (opinion of the Court).

Like many of the false trails we have followed in this area, the Court's confusion of statutory and constitutional inquiries is not without precedent. *Brown* v. *Ohio* contains dictum to the effect that, "[w]here consecutive sentences are imposed at a single criminal trial," the Double Jeopardy Clause prevents the sentencing court from "exceed[ing] its legislative authorization by imposing multiple punishments for the same offense." 432 U. S., at 165. In support of this dictum, which I believe ill-considered, *Brown* cited three cases: *Ex parte Lange*, 18 Wall. 163 (1874); *Bell* v. *United States*, 349 U. S. 81 (1955); and *Gore* v. *United States*, *supra*. In doing so, it tied together three separate strands of cases in what may prove to be a true Gordian knot.

In *Ex parte Lange* petitioner had been convicted under a statute authorizing a punishment of either fine or imprisonment. The District Court nevertheless sentenced him to a fine *and* imprisonment. Petitioner had paid his fine and had begun to serve his sentence when the District Court, appar-

ently recognizing its mistake, held a new sentencing proceeding and resentenced him to imprisonment only. Noting that petitioner had fully satisfied the relevant statute by paying the fine, this Court held that he was entitled to protection from a second punishment "in the same court, on the same facts, for the same statutory offence." 18 Wall., at 168. As is borne out by subsequent cases, the Double Jeopardy Clause as interpreted in *Ex parte Lange* prevents a sentencing court from increasing a defendant's sentence for any particular statutory offense, even though the second sentence is within the limits set by the legislature. See *North Carolina* v. *Pearce*, 395 U. S. 711 (1969); *United States* v. *Benz*, 282 U. S. 304, 307 (1931). See also *United States* v. *Sacco*, 367 F. 2d 368 (CA2 1966); *United States* v. *Adams*, 362 F. 2d 210 (CA6 1966); *Kennedy* v. *United States*, 330 F. 2d 26 (CA9 1964).

In *Bell* v. *United States*, *supra*, this Court considered a question wholly different from that considered in *Ex parte Lange* and its progeny: the proper units into which a statutory offense was to be divided. The petitioner in *Bell* had been convicted of two counts of violating the Mann Act, 18 U. S. C. § 2421 *et seq.*, for carrying two women across state lines for an immoral purpose. Both counts dealt with the same trip in the same car. The question presented to the Court was whether simultaneous transportation of more than one woman in violation of the Mann Act constituted multiple violations of that Act subjecting the offender to multiple punishments. The Court noted that Congress could, if it so desired, hinge the severity of the punishment on the number of women involved. Finding no evidence of such an intent, the Court applied the traditional "rule of lenity" and held that petitioner could only be punished for a single count.

Most significantly for our purposes, *Bell* was based entirely upon this Court's interpretation of the statute and the relevant legislative intent; it did not mention the Double Jeopardy Clause at all. In finding congressional intent on the

appropriate unit of prosecution dispositive, the Court acted consistently with a long line of cases based in English common law. In *Crepps* v. *Durden*, 2 Cowp. 640, 98 Eng. Rep. 1283 (K. B. 1777), Lord Mansfield, writing for a unanimous court, held that the sale of four loaves of bread on Sunday in violation of a statute forbidding such sale constituted one offense, not four. According to Lord Mansfield: "If the Act of Parliament gives authority to levy but one penalty, there is an end of the question. . . ." *Id.*, at 646, 98 Eng. Rep., at 1287. One hundred years later, this Court expressly adopted the reasoning of *Crepps* that the proper unit of prosecution was completely dependent upon the legislature's intent. See *In re Snow*, 120 U. S. 274, 283–286 (1887). We have consistently abided by this rule since that time, noting on at least one occasion that "[t]here is no constitutional issue presented" in such cases. See *Ladner* v. *United States*, 358 U. S. 169, 173 (1958). See also *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218 (1952); *Ebeling* v. *Morgan*, 237 U. S. 625 (1915). Cf. *Sanabria* v. *United States*, 437 U. S., at 69–70 (successive prosecutions).

*Gore* v. *United States*, the third case cited in *Brown*, presented an issue analogous to, but slightly different from, that presented in *Bell* and the other unit-of-prosecution cases, namely, the permissibility of consecutive sentences when a defendant committed a single act that violated two or more criminal provisions. This issue, the precise one confronting us today, has been litigated in an astonishing number of statutory contexts with little apparent analytical consistency. See, *e. g.*, *Simpson* v. *United States*, 435 U. S. 6 (1978); *Harris* v. *United States*, 359 U. S. 19 (1959); *Heflin* v. *United States*, 358 U. S. 415 (1959); *Prince* v. *United States*, 352 U. S. 322 (1957); *Pereira* v. *United States*, 347 U. S. 1 (1954); *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946); *Holiday* v. *Johnston*, 313 U. S. 342 (1941); *Blockburger* v. *United States*, 284 U. S. 299 (1932); *Morgan* v. *Devine*, 237 U. S. 632 (1915); *Burton* v. *United States*, 202 U. S. 344

(1906); *Carter* v. *McClaughry*, 183 U. S. 365 (1902). In some of these cases the Court seems to have recognized that it was attempting to divine legislative intent. See, *e. g.*, *Prince* v. *United States*, *supra*, at 328; *Morgan* v. *Devine*, *supra*, at 638–639; *Burton* v. *United States*, *supra*, at 377. In other cases, the Court seemed to apply a "same evidence" test borrowed from cases involving successive prosecutions.[1] See, *e. g.*, *Pereira* v. *United States*, *supra*, at 9; *Carter* v. *McClaughry*, *supra*, at 394–395. In still others it is difficult to determine the precise basis for the Court's decision. See, *e. g.*, *Harris* v. *United States*, *supra*. As in the unit-of-prosecution cases, this Court has specified on at least one occasion that the erroneous imposition of cumulative sentences in a single case raises no constitutional issue at all. See *Holiday* v. *Johnston*, *supra*, at 349.

Unlike the Court, I believe that the Double Jeopardy Clause should play no role whatsoever in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding. I would analogize the

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[1] The "same evidence" test was first formulated in *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871), where the Supreme Judicial Court of Massachusetts held:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence. A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

This Court has placed varying degrees of reliance upon this test both in the context of successive prosecutions, see, *e. g.*, *Brown* v. *Ohio*, 432 U. S. 161 (1977); *Gavieres* v. *United States*, 220 U. S. 338, 342 (1911), and in the context of multiple punishments imposed at a single criminal proceeding. See, *e. g.*, *Blockburger* v. *United States*, 284 U. S. 299 (1932); *Carter* v. *McClaughry*, 183 U. S. 365 (1902). See also *infra*, at 707–714.

present case to our unit-of-prosecution decisions and ask only whether Congress intended to allow a court to impose consecutive sentences on a person in petitioner's position. To paraphrase Lord Mansfield's statement in *Crepps* v. *Durden*, *supra*, that should be the end of the question. As even the Court's analysis of the merits here makes clear, see *ante*, at 690–694, traditional statutory interpretation as informed by the rule of lenity completely supplants any possible additional protection afforded petitioner by the Double Jeopardy Clause.

The difference in this context between a constitutional decision and a statutory decision is not merely one of judicial semantics. Both the Court and the concurrence appear to invoke the Double Jeopardy Clause to justify their refusal to defer to the District of Columbia Court of Appeals' interpretation of these locally applicable statutes. See *ante*, at 688 (opinion of the Court); *ante*, at 696 (BLACKMUN, J., concurring in judgment). The mischief in this approach, I believe, is well illustrated in a footnote—fairly described as either cryptic or tautological—stating that "[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Ante*, at 690, n. 4 (opinion of the Court). The effect of this and similar statements in the opinion of the Court, I fear, will be to raise doubts about questions of state law that heretofore had been thought to be exclusively the province of the highest courts of the individual States. To the extent that the Court implies that a state court can ever err in the interpretation of its own law and that such an error would create a federal question reviewable by this Court, I believe it clearly wrong.[2] For the question in

[2] We are not dealing here, of course, with a case where a state court has engaged in "retroactive lawmaking" by interpreting a local statute in an unforeseeable manner. Compare *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), with *Rose* v. *Locke*, 423 U. S. 48 (1975).

such cases is not whether the lower court "misread" the relevant statutes or its own common law, but rather who does the reading in the first place.

## II

Because the question before us is purely one of statutory interpretation, I believe that we should adhere to our "longstanding practice of not overruling the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed.'" *Pernell* v. *Southall Realty*, 416 U. S. 363, 369 (1974), quoting from *Griffin* v. *United States*, 336 U. S. 704, 718 (1949). In the present case I would suggest that the lower court, far from committing "egregious error," engaged in analysis much more sophisticated than that employed by the Court herein and reached a conclusion that is not only defensible, but quite probably correct.

The Court's attempt to determine whether Congress intended multiple punishment in a case like petitioner's is really quite cramped. It looks first to the legislative history surrounding the adoption of the relevant provisions and finds that history inconclusive. See *ante*, at 690, and n. 5. It then attempts to mechanistically apply the rule of statutory construction employed by this Court in *Blockburger* v. *United States*, 284 U. S. 299 (1932). See *ante*, at 691–694. Under that test, two statutory provisions are deemed to constitute the "same offense" so as to preclude imposition of multiple punishments unless "each provision requires proof of a fact which the other does not." 284 U. S., at 304. In *Blockburger*, for example, this Court determined that a provision forbidding the sale of certain drugs except in or from the original stamped package and a provision forbidding the selling of the same drugs "not in pursuance of a written order of the" purchaser defined separate offenses because "each of the offenses created requires proof of a different element." *Ibid.* Thus, separate penalties could be imposed under each statute, even though both offenses were based on the same sale.

Two observations about the *Blockburger* test are especially relevant in this case. First, the test is a rule of statutory construction, not a constitutional talisman.[3] See *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975). Having already posited that the Double Jeopardy Clause imposes no restraint upon a legislature's ability to provide for multiple punishments, I believe it clear that a legislature could, if it so desired, provide for separate punishments under two statutory provisions, even though those provisions define the "same offense" within the meaning of *Blockburger*. To take a simple example, a legislature might set the penalty for assault at two years' imprisonment while setting the penalty for assault with a deadly weapon as "two years for assault and an additional two years for assault with a deadly weapon." Even though the former crime is obviously a lesser included offense of the latter crime—or, in the rubric of *Blockburger*, the first offense does not require proof of any fact that the second does not—neither *Blockburger* nor the Double Jeopardy Clause would preclude the imposition of the "cumulative" sentence of two years.[4]

Second, the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining "compound" and "predicate" offenses. Strictly speaking, two crimes do not stand in the relationship of greater and lesser included offenses unless proof of the greater necessarily entails proof of the

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[3] It should not matter whether the *Blockburger* test enters this case as a common canon of statutory construction, see *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975), or through the "less than felicitous" phrasing of D. C. Code § 23–112. See *ante*, at 691 (opinion of the Court). In either case, the dispositive question is whether the legislature intended to allow multiple punishments, and the *Blockburger* test should be employed only to the extent that it advances that inquiry.

[4] In this regard, see also the discussion of the sentencing scheme under 18 U. S. C. § 924 (c)(1), *infra*, at 709.

lesser. See *Brown* v. *Ohio*, 432 U. S., at 167–168. See also Black's Law Dictionary 1048 (rev. 4th ed. 1968). In the case of assault and assault with a deadly weapon, proof of the latter offense will always entail proof of the former offense, and this relationship holds true regardless whether one examines the offenses in the abstract or in the context of a particular criminal transaction.

On the other hand, two statutes stand in the relationship of compound and predicate offenses when one statute incorporates several other offenses by reference and compounds those offenses if a certain additional element is present. To cite one example, 18 U. S. C. § 924 (c)(1) states that "[w]hoever . . . uses a firearm to commit any felony for which he may be prosecuted in a court of the United States . . . shall . . . be sentenced to a term of imprisonment for not less than one year nor more than ten years." Clearly, any one of a plethora of felonies could serve as the predicate for a violation of § 924 (c)(1).

This multiplicity of predicates creates problems when one attempts to apply *Blockburger*. If one applies the test in the abstract by looking solely to the wording of § 924 (c)(1) and the *statutes defining* the various predicate felonies, *Blockburger* would always permit imposition of cumulative sentences, since no particular felony is ever "necessarily included" within a violation of § 924 (c)(1). If, on the other hand, one looks to the *facts alleged in a particular indictment* brought under § 924 (c)(1), then *Blockburger* would bar cumulative punishments for violating § 924 (c)(1) and the particular predicate offense charged in the indictment, since proof of the former would necessarily entail proof of the latter.

Fortunately, in the case of § 924 (c)(1) Congress made its intention explicit, stating unequivocally that the punishment for violation of that statute should be imposed "in addition to the punishment provided for the commission of [the predicate] felony. . . ." 18 U. S. C. § 924 (c). But in the present

case, where the statutes at issue also stand in the relationship of compound and predicate offenses, Congress has not stated its intentions so explicitly. The felony-murder statute under consideration here provides:

> "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, . . . rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree." D. C. Code § 22–2401 (1973).

The rape statute under consideration reads, in relevant part:

> "Whoever has carnal knowledge of a female forcibly and against her will . . . shall be imprisoned for any term of years or for life." D. C. Code § 22–2801 (1973).

If one tests the above-quoted statutes in the abstract, one can see that rape is not a lesser included offense of felony murder, because proof of the latter will not necessarily require proof of the former. One can commit felony murder without rape and one can rape without committing felony murder. If one chooses to apply *Blockburger* to the *indictment* in the present case, however, rape is a "lesser included offense" of felony murder because, *in this particular case*, the prosecution could not prove felony murder without proving the predicate rape.

Because this Court has never been forced to apply *Blockburger* in the context of compound and predicate offenses,[5]

[5] But see *Simpson* v. *United States*, 435 U. S. 6, 11–12, and n. 6 (1978) (reserving application of *Blockburger* in context of 18 U. S. C. § 924 (c)); *Jeffers* v. *United States*, 432 U. S. 137, 149–150 (1977) (BLACKMUN, J.) (assuming, *arguendo*, that 21 U. S. C. § 846 is a lesser

we have not had to decide whether *Blockburger* should be applied abstractly to the statutes in question or specifically to the indictment as framed in a particular case. Our past decisions seem to have assumed, however, that *Blockburger*'s analysis stands or falls on the wording of the statutes alone. Thus, in *Blockburger* itself the Court stated that "the applicable rule is that where the same act or transaction constitutes a violation of two distinct *statutory provisions*, the test to be applied to determine whether there are two offenses or only one, is whether each *provision* requires proof of a fact which the other does not." 284 U. S., at 304 (emphasis added). More recently, we framed the test as whether " 'each *statute* requires proof of an additional fact which the other does not. . . .' " *Brown* v. *Ohio*, *supra*, at 166, quoting *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871) (emphasis added). See also *Iannelli* v. *United States*, 420 U. S., at 785, n. 17 ("[T]he Court's application of the [*Blockburger*] test focuses on the statutory elements of the offense"); M. Friedland, Double Jeopardy 212–213 (1969) (noting the two possible interpretations and pointing out that "the word 'provision' is specifically used in the test" as stated in *Blockburger*). Moreover, because the *Blockburger* test is simply an attempt to determine legislative intent, it seems more natural to apply it to the language as drafted by the legislature than to the wording of a particular indictment.

The Court notes this ambiguity but chooses instead to apply the test to the indictment in the present case.[6] See

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included offense of 21 U. S. C. § 848). But see also *American Tobacco Co.* v. *United States*, 328 U. S. 781, 788 (1946) (finding, under *Blockburger*, that conspiracies to violate §§ 1 and 2 of the Sherman Act could be punished separately).

[6] The Court denies that it applies the *Blockburger* test to the indictment in this case, asserting instead that it merely concludes that "rape [is] to be considered a lesser offense included within the offense of a killing in the course of rape." *Ante*, at 694, n. 8. Our disagreement on this matter turns on the elusive meaning of the word "offense." Technically,

*ante*, at 693–694. In doing so, it offers only two reasons for rejecting what would seem to be the more plausible interpretation of *Blockburger*. First, the Court notes that Congress *could* have broken felony murder down in six separate statutory provisions, one for each of the predicate offenses specified in § 22–2401, thereby insuring that, under *Blockburger*, rape would be a lesser included offense of murder in the course of rape. According to the Court, "[i]t is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it." *Ante*, at 694. The short answer to this argument is that Congress did *not* break felony murder down into six separate statutory provisions. Thus, it hardly avails the Court to apply *Blockburger* to a statute that Congress did not enact. More significantly, however, I believe that the Court's example illustrates one of my central points: when applied to compound and predicate offenses, the *Blockburger* test has nothing whatsoever to do with legislative intent, turning instead on arbitrary assumptions and syntactical subtleties. Cf. n. 6, *supra*. If the polestar in this case is to be legislative intent, I see no reason to apply *Blockburger* unless it advances that inquiry.

Second, the Court asserts that "to the extent that . . . the matter is not entirely free of doubt, the doubt must be re-

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§ 22–2401 defines only one offense, murder in the first degree, which can be committed in any number of ways. Even if the inquiry is limited to the "sub-offense" of felony murder, § 22–2401 indicates that a person may be convicted if he kills purposely in the course of committing any felony or kills even accidentally in the course of committing one of six specified felonies. Only by limiting the inquiry to a killing committed in the course of a rape, a feat that cannot be accomplished without reference to the facts alleged in this particular case, can the Court conclude that the predicate offense is necessarily included in the compound offense under *Blockburger*. Because this Court has never before had to apply the *Blockburger* test to compound and predicate offenses, see n. 5, *supra*, and accompanying text, there is simply no precedent for parsing a single statutory provision in this fashion.

solved in favor of lenity." *Ante*, at 694. This assertion, I would suggest, forms the real foundation of the Court's decision. Finding no indication in the legislative history whether Congress intended cumulative punishment, and applying *Blockburger* with insolubly ambiguous results, the Court simply resolves its doubts in favor of petitioner and concludes that the rape committed by petitioner must merge into his conviction for felony murder. In doing so, the Court neglects the one source that should have been the starting point for its entire analysis: the lower court's construction of the relevant statutes.

Unlike this Court, the District of Columbia Court of Appeals looked beyond the ambiguous legislative history and the inconclusive *Blockburger* test to examine the common-law roots of the crime of felony murder and to consider the societal interests protected by the relevant statutes. As for the first source, the lower court concluded from the history of felony murder at common law that "while the underlying felony is an element of felony murder it serves a more important function as an intent-divining mechanism" and that merger of the two offenses was therefore "inappropriate." 379 A. 2d 1152, 1160 (1977). In so reasoning, the lower court acted in conformity with this Court's long tradition of reading criminal statutes enacted by Congress "in the light of the common law. . . ." *United States* v. *Carll*, 105 U. S. 611, 612 (1882). See also *Morissette* v. *United States*, 342 U. S. 246, 262–263 (1952).

In addition to looking to the common law for assistance in determining Congress' intent, the lower court examined "the societal interests protected by the statutes under consideration." 379 A. 2d, at 1158–1159. Because § 22–2801 was designed "to protect women from sexual assault" while § 22–2401 was intended "to protect human life," the court concluded that cumulative punishment was permissible. 379 A. 2d, at 1159. Indeed, the *Blockburger* test itself could be

viewed as nothing but a rough proxy for such analysis, since, by asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.

## III

In sum, I find the lower court's reliance upon articulated considerations much more persuasive than this Court's capitulation to supposedly hopeless ambiguity. But even if the case were closer, I do not see how the lower court's conclusion could be classified as "egregious error" so as to justify our superimposing our own admittedly dubious construction of the statutes in question on the District of Columbia. Unless we are going to forgo deference to the interpretation of the highest court of the District of Columbia on matters of local applicability and are going to push several other well-recognized principles of statutory and constitutional construction out of shape, with consequences for the federal system for the 50 States, I would hope that the Court's decision would be one ultimately based on the "rule of lenity." Because I believe that the question confronting us is purely one of statutory construction and because I believe the analysis indulged in by the Court of Appeals for the District of Columbia comes far closer to the proper ascertainment of congressional intent than does this Court's opinion, I would affirm the judgment of the District of Columbia Court of Appeals.

Syllabus

# ANDRUS, SECRETARY OF THE INTERIOR *v.* IDAHO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79–260. Argued February 25, 1980—Decided April 16, 1980

The Carey Act of 1894, in order to aid covered States in the reclamation of desert lands, "authorize[s] and empower[s]" the Secretary of the Interior (Secretary), with the President's approval, upon proper application by a State to donate, grant, and patent such desert lands, not exceeding a specified acreage, as the State should cause to be irrigated, reclaimed, and occupied, provided however, that the lands may be restored to the public domain if the requirements as to reclamation are not satisfied within stated time limits. Under 43 U. S. C. § 643, the Secretary was also authorized, upon request of a State, to withdraw desert lands temporarily from the public domain prior to the State's submission of a formal plan under the Carey Act. Acting pursuant to 43 U. S. C. § 643, Idaho requested that a certain tract of land be temporarily withdrawn from the public domain pending the submission of a proposed development plan under the Act. The Idaho Office of the Bureau of Land Management rejected the application in part because some of the lands requested had already been withdrawn for other purposes, including a portion being used as a stock driveway. Idaho appealed to the Interior Board of Land Appeals with respect to the lands previously withdrawn for stock-driveway purposes, and also petitioned the Board for reclassification of the stock-driveway lands as suitable for use under the Act. Ultimately, the Board affirmed the rejection of Idaho's Carey Act application and returned the case to the Bureau of Land Management for initial action on the petition for reclassification of the stock-driveway lands and for further action on the remaining lands covered by the application for temporary withdrawal. Meanwhile, Idaho filed suit in Federal District Court for a declaration of its rights under the Act. That court held that the State was entitled to up to 2.4 million acres of desert land for which the Secretary was obligated to contract with the State pursuant to the terms of the Act; that the Act, however, was not a grant *in praesenti*, and the State did not have an absolute right to the particular desert lands that it happened to select; and that if the lands had been withdrawn for another public use pursuant to another statute, the State's remedy was to request reclassification, which the Secretary could not arbitrarily deny. The Court of Appeals affirmed.

*Held:*

1. There is a real case or controversy with respect to the issue presented in the United States' petition for certiorari as to whether, under the Act, the State was entitled to 2.4 million acres of desert land which the Secretary then must reserve from appropriation to other public or private uses, and not just as to the State's entitlement to the lands that had been withdrawn for stock-driveway purposes and that were involved in its Interior Department appeal. Throughout the administrative and judicial proceedings, the parties have taken contrary positions as to whether the State is absolutely entitled to select and have withdrawn under the Act up to 2.4 million acres of desert land regardless of whether the lands it designates have already been withdrawn for other purposes, provided only that statutory preconditions are satisfied. Pp. 722–725.

2. It is apparent from the language and legislative history of the Act that Congress did not intend to reserve any specific number of acres of desert land for any State under the Act, and the Act does not prevent the Secretary from committing otherwise available parts of the public domain for any of the uses authorized under the various statutes relating to the use and management of the public lands. The Act does not oblige the Secretary automatically to contract for lands chosen by the State even if its application otherwise conforms to the statute. Hence, even though a State's selection has not been withdrawn for other uses, the Secretary need not always approve the application. Pp. 725–731.

595 F. 2d 524, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 731.

*Stuart A. Smith* argued the cause for petitioner. On the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, William Alsup, Jacques B. Gelin,* and *Edward J. Shawaker.*

*David H. Leroy,* Attorney General of Idaho, argued the cause for respondents. With him on the brief were *W. Hugh O'Riordan* and *Josephine P. Beeman,* Deputy Attorneys General.*

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*Briefs of *amici curiae* urging affirmance were filed by *Terry L. Crapo* and *Rex E. Lee* for the Idaho Carey Act Development Association; and by

MR. JUSTICE WHITE delivered the opinion of the Court.

The Carey Act of 1894, ch. 301, § 4, 28 Stat. 422, 43 U. S. C. § 641, "to aid public-land States" in the reclamation of desert lands, authorizes the Secretary of the Interior upon proper application "to contract and agree, from time to time . . . binding the United States to donate, grant, and patent" such desert lands, not exceeding a specified acreage, as the State should cause to be irrigated, reclaimed, and occupied, provided, however, that the lands would be restored to the public domain if reclamation had not begun and plans were not carried out within stated time limits. Originally, each State covered by the Act was limited to one million acres; but in 1908, the ceiling for Idaho was raised to three million acres. Also, in 1910, upon request of a State, the Secretary was authorized to withdraw desert lands temporarily from the public domain prior to the State's submission of a formal plan under the Carey Act. 36 Stat. 237, 43 U. S. C. § 643 (1970 ed.).[1]

Of all Carey Act patents issued, a large majority were issued early in the century, the scarcity of water for irrigation being primarily responsible for the absence of patents in the past 30 years. Improved technology for pumping from deep water

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the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *George Deukmejian* of California, *J. D. MacFarlane* of Colorado, *Michael T. Greeley* of Montana, *Richard H. Bryan* of Nevada, *James A. Redden* of Oregon, *Robert B. Hansen* of Utah, *Slade Gorton* of Washington, and *John D. Troughton* of Wyoming.

[1] This legislation was prompted by a desire to prevent speculative filings under entry statutes on land chosen by a State for a Carey Act project. S. Rep. No. 367, 61st Cong., 2d Sess. (1910); H. R. Rep. No. 662, 61st Cong., 2d Sess. (1910). After the decision and judgment of the District Court in this case, this provision was repealed by § 704 (a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. 94-579, 90 Stat. 2792. Under § 204 of FLPMA, 43 U. S. C. § 1714, however, which gives the Secretary the general authority to make withdrawals, the Secretary construes his authority to allow him to withdraw public lands from entry pending submission of a formal plan under the Carey Act.

sources, however, among other things, has revived interest in reclaiming arid lands.

In 1974, the State of Idaho, acting pursuant to 43 U. S. C. § 643, requested that an identified tract of some 27,400 acres be temporarily withdrawn from the public domain pending the submission of a proposed development plan as required by the Carey Act. In January 1975, the Idaho State Office, Bureau of Land Management, rejected the application in part because some of the lands requested had already been withdrawn for other purposes, including a portion being used as a stock driveway. Idaho appealed to the Interior Board of Land Appeals with respect to the lands previously withdrawn for stock-driveway purposes.[2] Idaho also filed with the Board a petition under § 7 of the Taylor Grazing Act, 48 Stat. 1272, as amended, 49 Stat. 1976, 43 U. S. C. § 315f, for reclassification of the stock-driveway lands as suitable for use under the Carey Act.

The Board, in its decision issued on July 31, 1975, found that the applicable regulations prevented it from withholding action on the Carey Act application pending a decision on the Taylor Act reclassification petition.[3] The Board then rejected Idaho's assertion that its Carey Act application took precedence over any withdrawal subsequent to the date of the Act because the Act was a grant *in praesenti* or because

[2] On the State's failure to appeal the denial with respect to the lands covered by the application that had been withdrawn for purposes other than a stock driveway, the order as to these lands became final.

[3] The Board cited its stock-driveway regulations providing that "[l]ands withdrawn for driveways for stock . . . are not subject to entry or disposition" and that applications for the acquisition of such lands shall be rejected. 43 CFR § 2313.1 (c) (1974). The Board also relied on a general regulation, 43 CFR § 2091.1 (a) (1974), providing in pertinent part that "applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by . . . [w]ithdrawal or reservation of lands." The Board's prior cases are also to this effect.

the grant, when the specified conditions were fulfilled, related back to the date of the Act. The Board adhered to its prior decision in *State of Wyoming*, 36 L. D. 399 (1908), which held that under the Carey Act "the acceptance of the offer of the State is a matter wholly within the discretion of the Department." That being so, the State had no rights whatsoever to have *any* application approved. The Board further repeated *Wyoming*'s statement that if lands had been withdrawn for other purposes, the presumption that the withdrawal was proper is "conclusive," the lands were not available for a claim under the Carey Act, and the State was not entitled to a hearing "for the purpose of determining whether or not [the Secretary's] discretion has been properly exercised." *Id.*, at 400. The Board, therefore, affirmed the rejection of Idaho's Carey Act application. The case was returned to the Bureau of Land Management for initial action on the petition for reclassification of the stock-driveway lands and for further action on the remaining lands covered by the application for temporary withdrawal.

Meanwhile, in February 1975, the State of Idaho, through its appropriate officials, filed a complaint in the United States District Court for the District of Idaho against the Secretary of the Interior. The State alleged that by virtue of the Carey Act, the United States "has bound itself to donate, grant and patent to the State of Idaho . . . three million acres of desert lands," that "these lands are subject to temporary withdrawal and/or segregation upon [the State's] request," that the Secretary is "without any discretion to deny desert lands once requested," and that the Secretary now asserts that "he will not allow the requests for segregation or withdrawal under the Carey Act as a matter of right." The State prayed for a declaration of its rights under the Carey Act.[4] The Secre-

[4] The State alleged jurisdiction in the District Court "by virtue of a federal question existing and amounts of money involved . . . in excess of $10,000, exclusive of costs and interest." The State also alleged juris-

tary's answer admitted that he would not allow requests for segregation or withdrawal as a matter of right but denied the remainder of the foregoing allegations.

On cross-motions for summary judgment, Idaho submitted that the Carey Act had been an immediately effective grant, or at least that the United States was firmly obligated to contract with and patent the statutory acreage to Idaho when and if Idaho satisfied the statutory preconditions. In the State's view, Carey Act applications took precedence over prior withdrawals. The Secretary, therefore, had been wrong to deny Idaho's request for temporary withdrawal, even though the specified lands had already been withdrawn for other purposes. The United States, to the contrary, asserted that the Carey Act granted nothing to Idaho, had not obligated the Secretary to contract with Idaho with respect to any desert lands selected by the State, but had merely authorized the Secretary to contract if he, in his unbridled discretion, saw fit to do so. The Secretary, therefore, had committed no error and had not exceeded his authority under the Carey Act or any other law when he denied the petition for temporary withdrawal.

The District Court, in its memorandum opinion and decision of July 15, 1976, rejected the State's claim that the Carey Act was an *in praesenti* grant giving the State an absolute right to the acreage specified in the Act. The District Court went on to hold, however, (1) that Idaho was "guaranteed a maximum entitlement of three million acres of suitable desert land . . . which it cannot be deprived of by the Secretary of the Interior, if the State meets the conditions of the Carey Act"; (2) that "[t]he Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement,

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diction "pursuant to the Federal A. P. A. (5 USC 701 et seq)." The complaint did not recite that the State sought relief pursuant to the Declaratory Judgment Act, 28 U. S. C. § 2201, but the District Court understood the complaint as seeking declaratory relief.

which the Federal Government must contract to donate to the State in accordance with the Act"; and (3) that "[t]o the extent the land has been withdrawn for other purposes" and the State desires the land for Carey Act development, "its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry," in which event "[t]he Secretary may not arbitrarily deny the State's application for reclassification," his ruling thereon being subject to judicial review under the Administrative Procedure Act, 5 U. S. C. § 706. 417 F. Supp. 873, 881 (1976). The District Court went on to indicate its affirmance of the Interior Board of Land Appeals' decision and to this extent granted the Secretary's motion for summary judgment.

The Secretary moved for reconsideration and modification of the decision. The District Court again heard oral argument. After first suggesting that the District Court had erred in construing the Carey Act instead of merely sustaining the administrative action, the Secretary then agreed that the case had proceeded as a declaratory judgment action, or at least that it had a declaratory judgment dimension. The Secretary again presented his position that the Carey Act placed no obligation whatsoever on him to enter into any contract with Idaho or to approve any Carey Act application filed by the State.

In this respect, the judge expressed his disagreement and on August 26, 1976, entered his judgment, which, as amended in minor respects on November 15, (1) rejected the State's prayer for declaration of its absolute right to demand three million acres of the public domain without regard to any previous classifications and withdrawals and affirmed the decision of the Interior Board of Land Appeals; (2) declared that Idaho is "entitled to have withdrawn and patented three million acres of the desert lands in the public domain," provided that there are sufficient desert lands within the State of Idaho and provided that Idaho satisfies all the terms and conditions of the Act, and declared that by the Carey Act the

United States had "bound itself to contract, donate, grant and patent to the State of Idaho, upon compliance with the stated conditions, . . . not to exceed three million acres [of desert land], as that sum may be reduced by prior patents issued pursuant to the Carey Act"; and (3) declared that with respect to desert lands presently withdrawn from the public domain for other purposes, the State's remedy, should it desire to initiate Carey Act development on such lands, "is to petition the [Secretary] for temporary withdrawal under 43 U. S. C. Sec. 643 and/or under 43 U. S. C. Sec. 315f, and it is the duty of the [Secretary] to entertain and act upon said petition or petitions in accordance with the public land laws of the United States of America and in accordance with due and proper administrative procedures."

The Ninth Circuit affirmed the judgment "[u]pon the basis of the carefully written opinion" of the District Judge. 595 F. 2d 524 (1979). We granted the petition for writ of certiorari filed by the United States and presenting the single question whether the Carey Act "requires the Secretary of the Interior indefinitely to reserve from appropriation to other public or private uses some 2.4 million acres of desert land within Idaho for the eventuality that the State may be able and willing to select all or any part of such acreage for irrigation and reclamation under the Act." 444 U. S. 914 (1979).

## I

There is first the question raised at the oral argument of this cause whether there is a case or controversy between the State and the Secretary as to anything other than the State's entitlement to the lands that had been withdrawn for stock-driveway purposes and that were involved in its Interior Department appeal; or, to put the matter another way, whether there is a real case or controversy with respect to the issue that the United States presented in its petition for certiorari, namely, whether the State was entitled to 2.4 million acres of desert land which the Secretary then must preserve

for Carey Act development. Although the United States urged on appeal in the Court of Appeals that there was no case or controversy whatsoever, even as to any of the lands covered by Idaho's Carey Act application for temporary withdrawal,[5] the Court of Appeals apparently rejected the argument; the United States raised no jurisdictional question in its petition or its brief; and the Solicitor General at oral argument was of the opinion that the District Court and the Court of Appeals had jurisdiction to enter the judgments that appear in this record. We have the same view.

From the very outset, the State took the position that it is absolutely entitled to select and have withdrawn under the Carey Act up to 2.4 million acres of desert land, provided only that it satisfy the statutory preconditions. Whether or not the lands that it designated had already been withdrawn for other purposes, such as a stock driveway, it was the State's view that the Secretary had no discretion to deny withdrawal of desert lands that the State selected. The Secretary, on the other hand, from the outset, denied that the State had any right to contract for desert lands under the Carey Act and asserted that it was within his discretion to deny any and all state requests for withdrawal or segregation of lands under the Carey Act, whether or not the selected lands were already in use for other purposes. These were the respective positions of the parties in the Interior Department proceedings, with the Interior Board of Land Appeals rejecting the State's and adopting the Secretary's position.

These were also the positions of the parties in the District Court. The State and the Secretary were thus at odds over

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[5] In the Court of Appeals, the Secretary conceded that a case or controversy had existed with respect to the stock-driveway lands for which temporary withdrawal had been requested under § 643 but asserted that the controversy had become moot with the repeal of § 643. The Secretary now concedes, however, that under the Federal Land Policy and Management Act of 1976, even though it repealed § 643, he has the same power of temporary withdrawal as he had under § 643. See n. 1, *supra*.

the proper construction of the Carey Act, over the State's entitlement under the statute, and over the extent of the Secretary's discretion. If the State was correct as to the meaning of the Act, the denial of its request for withdrawal of the stock-driveway lands was incorrect; but the denial was correct if the Secretary had the better view of the statute. We thus find it undeniable that there was a case or controversy between the Secretary and the State with respect to the approval of its Carey Act application and that the case or controversy in this respect turned on what rights, if any, the State had under this 1894 statute. Although at the time that the case was filed in the District Court, the State's administrative appeal had not yet been decided, a case or controversy in the Art. III sense existed; and, in any event, administrative appellate procedures were soon exhausted. The District Court accepted the case as involving a review of the Secretary's action and as requiring a declaration of the respective rights of the State and the Secretary under the Act.

In proceeding to address the statutory issues tendered by the State, the District Court rejected both the position of the State and that of the Secretary. The State was entitled to up to 2.4 million acres of desert land for which the Secretary was obligated to contract with the State pursuant to the terms of the Act; but the Act was not a grant *in praesenti*, and the State did not have an absolute right to the particular desert lands that it happened to select. If the lands had been withdrawn for another public use pursuant to another statute, the State's remedy was to request reclassification, which the Secretary could not arbitrarily deny. Under this approach, the Secretary was correct in denying the State's request for immediate withdrawal of the lands already in use as a stock driveway; but the Secretary was quite wrong in claiming absolute discretion to deny any Carey Act application, including the State's pending application insofar as it covered lands that had *not* yet been withdrawn for other purposes.

These elements were included in the District Court's judgment and were supported by its opinion. We find no jurisdictional barrier to the entry of such a judgment or to appellate review of that part of the judgment to which the United States objects as a misconstruction of the Carey Act and as an unwarranted extension of rights to the State that would constitute a substantial interference with the authority of the Secretary to manage the public lands.

## II

As was set out above, the judgment declared that Idaho is "entitled" to 2.4 million acres of Carey Act land and that the Secretary is "bound" to contract for such lands. Although the judgment did not prevent the Secretary from putting desert lands to other uses, the judgment, fairly read, would obligate the Secretary to contract with the States for lands selected by it that had not been so withdrawn, if the State complied with the statutory conditions.[6] The Secretary submits that the Act does not so drastically limit his discretion. He also understands these same provisions of the judgment to mean that he "must hold for eventual disposition under the Carey Act approximately 2.4 million acres of unappropriated desert lands." Brief for Petitioner 8. At least that much desert land, he says, must be reserved and may not be put to other uses. Although the judgment does not so provide in so many words, it is fairly arguable that this is what the trial court intended, particularly because in its opinion, which the Court of Appeals made its own, the trial court held that the

[6] The State has not cross petitioned from the holding that the Carey Act is not a grant *in praesenti* and that a Carey Act application does not automatically take precedence over prior withdrawals. The State as a respondent is not entitled, absent a cross-petition, to bring that issue before us; for a favorable ruling would enlarge the relief granted the State under the Court of Appeals judgment. The State does of course strongly urge, as it may, that it is entitled to at least what the District Court recognized to be its rights under the Carey Act.

State is "guaranteed" the statutory acreage, "which it cannot be deprived of by the Secretary," and that the Secretary is under an "obligation to preserve enough desert land suitable for Carey Act development" to fulfill the State's entitlement. The precise meaning of the judgment in this respect, however, we do not further pursue; for as we understand the language and legislative history of the Carey Act, it neither requires the Secretary to hold the statutory acreage in reserve nor obliges him always to contract with the State for desert lands that the State selects from those parts of the public domain that have not been withdrawn for other purposes.

The language of the Act[7] "authorize[s] and empower[s]," but does not direct, the Secretary to contract with the State upon the State's proper application. This is permissive language, as compared with the obligatory statutory language requiring the Secretary to issue a patent once he has contracted with the State and the State has satisfied the contractual and statutory conditions. Furthermore, the Secretary may act only with the approval of the President, a provision which strongly suggests that the statutory discretion to con-

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[7] The Carey Act, 43 U. S. C. § 641, provides in pertinent part:

"To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President . . . is authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands . . . binding the United States to donate, grant, and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and . . . cultivated by actual settlers . . . within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands. . . ."

Section 641 further provides that if the requirements as to reclamation are not satisfied within certain time periods, the Secretary may restore the lands to the public domain or may authorize limited extension of the deadlines.

tract is broader than merely determining whether the application on its face satisfies the statutory requirements.[8]

In ascertaining the meaning of the relevant language of the Act, it is important to note the circumstances of its adoption in 1894. The initial version of the Act was adopted in the Senate as an amendment to an appropriations bill that had already passed the House. The amendment, which was offered by Senator Carey of Wyoming, was in the form of a Senate bill that had previously been offered by the Senator and passed by the Senate but was still pending before a House committee. This bill, and the amendment to the appropriations bill, provided that each State could select up to the specified acreage of desert lands and that upon selection the lands would be immediately reserved from other entry and would be patented to the State upon proof that the selected land had been suitably reclaimed. The House conferees brought the amended appropriations bill before the House where a substitute for the Senate amendment was offered by Representative McRae and was adopted after full debate. The Conference Committee then adopted the House substitute, and it was this version that became known as the Carey Act.

For present purposes, the principal difference between the

[8] The District Court purported to find some support for its conclusion in *Idaho Irrigation Co.* v. *Gooding*, 265 U. S. 518, 521 (1924), where the Court recited that the Carey Act "binds" the United States to donate desert lands to the States. The passage referred to, however, does not say that the United States is bound to contract in the first instance. In any event, that case involved a dispute between an irrigation company and the owners of water rights pursuant to contracts with the company; and it was only in describing the background of the case that the Court referred to the Carey Act. There was no question in that case as to the scope of the State's entitlement under the Act or the scope of the Secretary's discretion. Attaching great significance to this recitation is unwarranted. Nor do we find the other state and federal cases that the District Court cited to be persuasive support for its conclusions as to the Secretary's obligations.

Senate amendment and the McRae substitute was that the former provided for automatic reservation upon selection by the State and the latter did not. As Representative McRae explained, 26 Cong. Rec. 8391 (1894): "The Senate proposition makes a reservation outright for the States and will make it possible for the States to put a million of acres in each State in reservation for an indefinite period. . . . The pending proposition does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract with any States in which any of these lands may be situated. . . ." And again, *id.*, at 8431: "This is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed." There are some indications during the debates, originating from both proponents and opponents of the provision, that perhaps a more substantive action was intended; but there is nothing that undercuts the explanation of Representative McRae as to the meaning of the markedly different language contained in the House substitute. Nor is there anything persuasive in the several later additions or amendments to the Carey Act to indicate that the Act reserved to the States or obligated the Secretary to contract for any particular acreage for Carey Act development.[9]

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[9] In 1896, Congress provided that patents could be issued when water had been supplied to the land without regard to settlement or cultivation. The same Act provided for liens against the lands prior to patent for the costs of reclamation. Act of June 11, 1896, § 1, 29 Stat. 434, 43 U. S. C. § 642. Although § 642 refers to the "grant" made under § 641, the context indicates that the word is loosely used to refer to the state laws enacted in acceptance of the terms of the Carey Act. Idaho, in fact, stresses that it, like 9 of the 11 other desert land States, specifically referred to the Carey Act's "grants of land" when the State enacted legislative acceptances of the offer to obtain federal lands by reclamation. Brief for Respondents 12–13, and n. 6.

Subsequent legislation did not touch on the issue at all. In 1908, an

It has also been the consistent view of the Department of the Interior that the Carey Act does not grant or reserve any specified acreage of desert lands for development under the Carey Act. *State of Wyoming*, 36 L. D. 399 (1908), relied on by the Secretary in this case, stands for at least this much; and we have in other cases accorded a considerable deference to the responsible agency's construction of the statute which it administers. *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 613–614 (1978); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *Cameron* v. *United States*, 252 U. S. 450, 460 (1920). It is also ascertainable from the Congressional Record, reflecting the proceedings connected with the 1908 amendments to the Carey Act, that the eight States covered by the Act had by that time selected approximately 2.72 million acres under the Carey Act but that less than half that amount, 1.12 million acres, had been approved and only 200,000 acres had gone to patent. One of the many reasons for rejections of selected lands had been that they

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additional two million acres of desert lands were authorized for Carey Act selection in the State of Idaho, 43 U. S. C. § 645 and Joint Res. 28, 60th Cong., 1st Sess. (1908), see 35 Stat. 577; and an additional one million acres in the State of Wyoming. 43 U. S. C. § 645. In 1909, the provisions of the Carey Act were extended to the States of Arizona and New Mexico, § 646, and to the former Ute Indian Reservation in Colorado. § 647. In 1910, as indicated in the text, § 643 with respect to temporary withdrawals was adopted. In 1911, the Act was extended to the Fort Bridger Military Reservation in Wyoming, Act of Feb. 16, 1911, ch. 90, 36 Stat. 913; and an additional one million acres were authorized for the States of Nevada and Colorado. 43 U. S. C. § 645. The Act was amended in 1920 with respect to rights of entry by settlers on lands covered by unsuccessful Carey Act projects. § 644. In 1921, the Secretary of the Interior was authorized to extend the period of segregation or to restore the lands to the public domain when States failed to construct the anticipated reclamation works. § 641. Congress at no time indicated disagreement with the way that the Secretary was administering the Carey Act, at least as relevant to the issues in this case.

were already in other legitimate use or that such use was being considered. 42 Cong. Rec. 6437 (1908).[10]

Against this background, we conclude that Congress did not intend to reserve any specific number of acres of desert land for any State under the Carey Act and that the Act does not prevent the Secretary from committing otherwise available parts of the public domain for any of the uses authorized under the various statutes relating to the use and management of the public lands, such as the Taylor Grazing Act under which part of the lands that Idaho sought in this case have been withdrawn. It is also clear that one of the reasons prompting the McRae substitute was to eliminate the right of the State under the Senate version to have automatically reserved and to contract for the particular lands that it selected. As finally adopted, the Act does not oblige the Secretary automatically to contract for lands chosen by the State even if its application otherwise conforms to the statute. Hence, even though a State's selection has not been withdrawn for other uses, as is the case with part of the land that Idaho applied for in this case,[11] the Secretary need not always approve the application.[12]

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[10] During the discussion, Representative Gaines of Tennessee asked Representative French of Idaho to explain why the Secretary had not granted all Carey Act applications. Representative French replied:

"The reason is this: We have a national reclamation law under which lands are being reclaimed; we have the Indian reservation law; we have lands that have passed into private ownership under the desert-land act and other laws. Sometimes it happens that an application for segregation under the Carey Act overlaps one or more of these propositions or tracts of land."

[11] Prior to the District Court's judgment, the Board also ruled on two other Carey Act applications by Idaho covering unwithdrawn and otherwise available land. *Idaho Department of Water Resources*, 25 I. B. L. A. 27 (1976); *Idaho Department of Water Resources*, 24 I. B. L. A. 314 (1976).

[12] The Secretary has not questioned the judgment and opinion of the District Court indicating that the Secretary's refusal to reclassify with-

The District Court was therefore correct in remitting the State to a reclassification proceeding with respect to the land in use as a stock driveway; but the District Court erred in declaring that the Act entitled the State to the statutory acreage in the sense that the Secretary was firmly bound to reserve such acreage and to contract for it as and when the State selected it.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed in part and reversed in part.

*So ordered.*

MR. JUSTICE STEVENS, dissenting.

Everyone agrees that the District Court correctly rejected Idaho's now-abandoned claim that the Carey Act, as amended, constituted an absolute, present grant of entitlement to any three million acres of arid lands that the State might designate at some time in the future. But the District Court's rejection of that claim did not require it to express any opinion on any of the questions that the Court discusses today.

This record does not present the question of what reasons, if any, are necessary or sufficient to justify a denial by the Secretary of a Carey Act application or a petition for reclassification under the Taylor Grazing Act.[1] I would therefore express no opinion on that question.

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drawn lands for Carey Act purposes would be subject to judicial review and would be set aside if arbitrary or capricious. Neither has the Secretary asserted that his rejection of a State's application for withdrawal or segregation of appropriate desert lands in the public domain would not be subject to judicial review under the Administrative Procedure Act, 5 U. S. C. § 706. To the extent that the claim of absolute discretion to approve or disapprove Carey Act applications is inconsistent with the absence of a direct challenge to this aspect of the District Court's decision or with the general standards for judicial review of agency action under the Administrative Procedure Act, we reject, as did the District Court, the claim of absolute discretion.

[1] Idaho's complaint prayed simply for a declaration that "the State of Idaho has an absolute right to demand up to three million acres of desert

Nor is there anything in this record to suggest that there is any imminent likelihood that the Secretary will reserve for other purposes so much of the federal land in Idaho otherwise suitable for Carey Act contracts that less than 2.4 million acres will be available.[2] Unless and until such a likelihood appears, there is no need to decide whether he may do so. The fact that in the 85-year life of the Carey Act Idaho has used only about one-fifth of the three million acres authorized makes it rather clear that resolution of that issue is of no immediate consequence to either party.

In short, I do not believe either of the questions on which the Court has volunteered its advice is ripe for decision. I would simply vacate the purely advisory portions of the District Court's judgment and refrain from deciding any questions not fairly raised by this record.

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lands under the Carey Act and further . . . that the [Secretary of the Interior] . . . has no authority or discretion to deny any request for segregation or withdrawal when presented by the Plaintiff." App. 6.

[2] It was suggested by the State at oral argument that perhaps as much as 8.5 million acres is "susceptible of possible irrigation that is still in Federal hands." Tr. of Oral Arg. 31. To date, Idaho has received approximately 600,000 acres under the Carey Act.

## Reporter's Note

The next page is purposely numbered 901. The numbers between 732 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

## ORDERS FROM FEBRUARY 25 THROUGH APRIL 17, 1980

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### FEBRUARY 25, 1980

*Affirmed on Appeal*

No. 79–953. FEENEY *v.* PERSONNEL ADMINISTRATOR OF MASSACHUSETTS ET AL. Affirmed on appeal from D. C. Mass. Reported below: 475 F. Supp. 109.

*Miscellaneous Orders*

No. D–173. IN RE DISBARMENT OF SALLS. Disbarment entered. [For earlier order herein, see 444 U. S. 894.]

No. D–178. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see 444 U. S. 912.]

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of Louisiana for divided argument granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, 444 U. S. 1064.]

No. 78–6885. HICKS *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 444 U. S. 963.] Motion of Jan Eric Cartwright, Attorney General of Oklahoma, to permit Janet L. Cox to present oral argument *pro hac vice* granted.

No. 79–4. WILLIAMS ET AL. *v.* ZBARAZ ET AL.;

No. 79–5. MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL.; and

No. 79–491. UNITED STATES *v.* ZBARAZ ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 444 U. S. 962.] Petition for rehearing of denial of motion for appointment of Alan Ernest as counsel for children unborn and born alive denied.

No. 79–66. AARON *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. [Certiorari granted, 444 U. S. 914.] Motion of Securities Industry Association for leave to participate in oral argument as *amicus curiae* denied.

No. 79–509. EXXON CORP. *v.* DEPARTMENT OF REVENUE OF WISCONSIN. Sup. Ct. Wis. [Probable jurisdiction noted, 444 U. S. 961.] Motions of Frank M. Keesling and Multistate Tax Commission for leave to file briefs as *amici curiae* granted.

No. 79–521. CONSUMER PRODUCT SAFETY COMMISSION ET AL. *v.* GTE SYLVANIA, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 444 U. S. 979.] Motion of Consumer Federation of America for leave to participate in oral argument as *amicus curiae* denied.

No. 79–672. NATIONAL LABOR RELATIONS BOARD *v.* RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSN., AFL–CIO. C. A. D. C. Cir. [Certiorari granted, 444 U. S. 1011.] Motion of respondent Safeco Title Insurance Co. for additional time for oral argument denied.

No. 79–1056. NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this order.

No. 79–6019. BRAUDRICK *v.* ESTELLE, CORRECTIONS DIRECTOR; and

No. 79–6044. SMITH *v.* HEEDE, CLERK, U. S. DISTRICT COURT, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

*Probable Jurisdiction Noted*

No. 79–5903. H. L. *v.* MATHESON, GOVERNOR OF UTAH, ET AL. Appeal from Sup. Ct. Utah. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 604 P. 2d 907.

*Certiorari Granted*

No. 79–900. FEDERAL TRADE COMMISSION ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA. C. A. 9th Cir. Certiorari granted. Reported below: 596 F. 2d 1381.

No. 79–1003. IMPERIAL COUNTY, CALIFORNIA, ET AL. *v.* MUNOZ ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 604 F. 2d 1174.

*Certiorari Denied*

No. 79–552. MITSUI & CO., LTD., ET AL. *v.* INDUSTRIAL INVESTMENT DEVELOPMENT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 48.

No. 79–693. CONSUMER CREDIT INSURANCE AGENCY, INC., ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 770.

No. 79–743. MOORE *v.* UNITED STATES;
No. 79–5612. PALMER *v.* UNITED STATES; and
No. 79–5624. RICHARDSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 808.

No. 79–764. FALK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 1005.

No. 79–775. WHITMAN, SHERIFF *v.* FORD. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1192.

No. 79–783. PAYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 1215.

No. 79–884. TUCKER *v.* HARTFORD NATIONAL BANK & TRUST CO. Sup. Ct. Conn. Certiorari denied. Reported below: 178 Conn. 472, 423 A. 2d 141.

No. 79–908. TANKERSLEY ET AL. *v.* TRINITY PRESBYTERIAN CHURCH OF MONTGOMERY, ALA., ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 374 So. 2d 861.

No. 79–913. GONZALEZ *v.* DEPARTMENT OF HUMAN RESOURCES OF TEXAS. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 581 S. W. 2d 522.

No. 79–924. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 149.

No. 79–937. VARGO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 504.

No. 79–944. DAYTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 931.

No. 79–951. WOODSIDE, ADMINISTRATRIX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 134.

No. 79–974. MINNESOTA *v.* CLARK ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 282 N. W. 2d 902.

No. 79–991. HOWARD *v.* DES MOINES REGISTER & TRIBUNE CO. ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 283 N. W. 2d 289.

No. 79–1024. AMERICAN CONTINENTAL HOMES, INC., ET AL. *v.* KFK CORP. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 71 Ill. App. 3d 304, 389 N. E. 2d 232.

No. 79–1025. ATKINS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 261 S. E. 2d 55.

No. 79–1038. PALMER *v.* INDUSTRIAL COMMISSION OF THE STATE OF COLORADO ET AL. Ct. App. Colo. Certiorari denied.

No. 79–1043. CITY OF BLACK JACK ET AL. *v.* BATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 1033.

No. 79–1045. MURPHY *v.* OWENS-CORNING FIBERGLAS CORP. C. A. 10th Cir. Certiorari denied.

No. 79–1049. SMITH *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 266 Ark. 861, 587 S. W. 2d 50.

No. 79–1065. O'HAIR *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1005.

No. 79–1067. MCMILLAN *v.* MARINE SULPHUR SHIPPING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 1034.

No. 79–1115. JAMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 2d 36.

No. 79–1151. ELLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79–1155. GARDNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1292.

No. 79–5685. HOOKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 286.

No. 79–5712. STRONG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–5724. MCNEAR *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 586 S. W. 2d 720.

No. 79–5763. STARKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79–5788. MARINOFF *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 806.

No. 79–5784. EVANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 553.

No. 79–5794. RICHMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 547.

No. 79–5806. HUNT *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 332.

No. 79–5879. STEBBINS *v.* GOVERNMENT EMPLOYEES INSURANCE CO. C. A. D. C. Cir. Certiorari denied.

No. 79–5883. MONTALBANO *v.* NEW JERSEY. Super Ct. N. J. Certiorari denied.

No. 79–5893. YOUNG *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 394 N. E. 2d 123.

No. 79–5895. BROWN *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–5897. DRAPER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79–5898. VON ARX *v.* HARRISBURG STATE HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1199.

No. 79–5905. SKOLNICK *v.* INDIANA ET AL. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 388 N. E. 2d 1156.

No. 79–5908. GREEN *v.* WALTERS ET AL. C. A. 8th Cir. Certiorari denied.

No. 79–5909. KIRKLAND *v.* LEEKE, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 508.

No. 79–5910. COLE *v.* FORD, JUDGE. Ct. App. Tenn. Certiorari denied.

No. 79–5906. GILLIAM *v.* LOS ANGELES MUNICIPAL COURT (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 97 Cal. App. 3d 704, 159 Cal. Rptr. 74.

No. 79–5915. KORN *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied.

No. 79–5929. TAYLOR *v.* CITY OF ATLANTA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 990.

No. 79–5944. RODRIGUEZ *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 612 F. 2d 569.

No. 79–5965. AMISTADI *v.* SPANGENBERG ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 79–5976. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 79–5997. BARRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79–6001. DELAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 1365.

No. 79–6005. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1310.

No. 79–6010. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–376. LAKESIDE BRIDGE & STEEL CO. *v.* MOUNTAIN STATE CONSTRUCTION CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 597 F. 2d 596.

MR. JUSTICE WHITE, with whom MR. JUSTICE POWELL joins, dissenting.

I dissent from the denial of the petition for certiorari.

Petitioner, a Wisconsin corporation with its place of business in Milwaukee, Wis., contracted with respondent, a West

Virginia corporation with its principal place of business in Charleston, W. Va., to sell structural assemblies for incorporation by respondent into the outlet works of a dam and reservoir in Virginia. Aside from the contacts arising from the negotiation, execution, and performance of this contract, respondent has never had any connection with the State of Wisconsin. Petitioner's agent initiated the negotiations by visiting respondent's offices in West Virginia and delivering a quotation. The quotation provided that "[a]ny order arising out of this proposal . . . is subject to home office acceptance at Milwaukee, Wisconsin." Respondent then mailed petitioner its purchase order referring to petitioner's quotation. Petitioner signed the purchase order in Milwaukee and returned it to respondent together with a proposed modification, which became part of the contract when respondent treated the modified order as effective. During the course of their negotiations both parties initiated other communications between their respective offices either by telephone or by mail.

The contract provided that the goods were to be shipped "F. O. B. SELLERS [*sic*] PLANT MILWAUKEE, WISCONSIN with freight allowed to rail siding nearest project site," and stated that Wisconsin law would govern the transaction. According to petitioner, Pet. for Cert. 4, the total contract price was $1,281,750.00. Petitioner proceeded to manufacture the goods at its plant in Wisconsin and ship them to the project site in Virginia. Respondent asserted that some of the goods were defective and withheld part of the purchase price.

Petitioner thereupon filed the present action in a Wisconsin state court to recover the unpaid balance on the contract. It alleged personal jurisdiction under Wisconsin's long-arm statute, Wis. Stat. §§ 801.05, 801.11 (1975), which has been interpreted to reach as far as due process will allow, *Flambeau Plastics Corp.* v. *King Bee Mfg. Co.*, 24 Wis. 2d 459, 464, 129 N. W. 2d 237, 240 (1964). Respondent removed the case

to the United States District Court for the Eastern District of Wisconsin. It there filed a motion to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to a federal district court in Virginia or West Virginia. The court denied the motion and entered summary judgment for petitioner on the merits.

The Court of Appeals for the Seventh Circuit reversed, 597 F. 2d 596 (1979), holding that respondent's contacts with the Wisconsin forum were not sufficient to satisfy the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). The court found that the contacts with the forum consisted solely of "unilateral activity of [one] who claim[s] some relationship with a nonresident defendant" of the type found insufficient to sustain personal jurisdiction in *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958). Although respondent ordered the goods from a Wisconsin corporation with knowledge that they were likely to be manufactured in Wisconsin, respondent did not thereby "purposefully avai[l] itself of the privilege of conducting activities within the forum State," *ibid.*, since the contract left petitioner with absolute discretion as to where the goods would be manufactured. Nor did the Court of Appeals find the requisite minimum contacts in (a) the contract provision requiring shipment f. o. b. petitioner's plant in Milwaukee, (b) respondent's use of interstate telephone and mail services to communicate with petitioner in Wisconsin, or (c) respondent's sending the purchase order to Wisconsin. The Court of Appeals therefore remanded the case to the District Court with directions to vacate the judgment and either dismiss the case or transfer it to another district.

As the Court of Appeals noted, 597 F. 2d, at 601, the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts. Cases arguably in conflict with the decision below include: *Pedi Bares, Inc.* v. *P & C Food Markets, Inc.*, 567 F. 2d 933 (CA10

1977); *United States Railway Equipment Co.* v. *Port Huron & Detroit R. Co.*, 495 F. 2d 1127 (CA7 1974); *Product Promotions, Inc.* v. *Cousteau*, 495 F. 2d 483, 494–499 (CA5 1974); *Ajax Realty Corp.* v. *J. F. Zook, Inc.*, 493 F. 2d 818 (CA4 1972), cert. denied *sub nom. Durell Products, Inc.* v. *Ajax Realty Corp.*, 411 U. S. 966 (1973); *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F. 2d 220 (CA6 1972); *O'Hare Int'l Bank* v. *Hampton*, 437 F. 2d 1173 (CA7 1971); *Electro-Craft Corp.* v. *Maxwell Electronics Corp.*, 417 F. 2d 365 (CA8 1969); *Manufacturers' Lease Plans, Inc.* v. *Alverson Draughon College*, 115 Ariz. 358, 565 P. 2d 864 (1977) (en banc); *Colony Press, Inc.* v. *Fleeman*, 17 Ill. App. 3d 14, 308 N. E. 2d 78 (1974); *Miller* v. *Glendale Equipment & Supply, Inc.*, 344 So. 2d 736 (Miss. 1977); *McIntosh* v. *Navaro Seed Co.*, 81 N. M. 302, 466 P. 2d 868 (1970); *State ex rel. White Lumber Sales, Inc.* v. *Sulmonetti*, 252 Ore. 121, 448 P. 2d 571 (1968) (en banc); *Proctor & Schwartz, Inc.* v. *Cleveland Lumber Co.*, 228 Pa. Super. 12, 323 A. 2d 11 (1974); *Zerbel* v. *H. L. Federman & Co.*, 48 Wis. 2d 54, 179 N. W. 2d 872 (1970), appeal dism'd, 402 U. S. 902 (1971). Cases arguably supporting the decision below include: *Republic Int'l Corp.* v. *Amco Engineers, Inc.*, 516 F. 2d 161, 167 (CA9 1975) (dictum); *Whittaker Corp.* v. *United Aircraft Corp.*, 482 F. 2d 1079, 1084–1085 (CA1 1973) (construing state law); *E. R. Callender Printing Co.* v. *District Court*, 182 Colo. 25, 510 P. 2d 889 (1973) (en banc) (construing state law); *Rath Packing Co.* v. *Intercontinental Meat Traders, Inc.*, 181 N. W. 2d 184 (Iowa 1970); *O. N. Jonas Co.* v. *B & P Sales Corp.*, 232 Ga. 256, 206 S. E. 2d 437 (1974) (construing state law); *Marshall Egg Transport Co.* v. *Bender-Goodman Co.*, 275 Minn. 534, 148 N. W. 2d 161 (1967) (construing state law); *Conn* v. *Whitmore*, 9 Utah 2d 250, 342 P. 2d 871 (1959) (construing state law); *Sun-X Int'l Co.* v. *Witt*, 413 S. W. 2d 761 (Tex. Civ. App. 1967). The question at issue is one of considerable importance to contractual dealings between purchasers and sellers located in

different States. The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests that prior decisions of this Court offer no clear guidance on the question. I would grant the petition in order to address this important problem.

No. 79–802. JANELLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 601 F. 2d 604.

No. 79–901. OHIO *v.* KORN. Ct. App. Ohio, Butler County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 79–959. IOWA ELECTRIC LIGHT & POWER CO. *v.* ATLAS CORP. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari in order to address the conflict among state and federal courts noted in MR. JUSTICE WHITE's dissent from denial of certiorari in *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, No. 79–376, *ante*, p. 907. MR. JUSTICE BLACKMUN would grant certiorari and set case for oral argument. Reported below: 603 F. 2d 1301.

No. 79–1005. ALTON BOX BOARD CO. ET AL. *v.* THREE J. FARMS, INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 609 F. 2d 112.

No. 79–1057. GILBERT *v.* UNION CARBIDE CORP. C. A. 7th Cir. Motion of Louis Robertson for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 601 F. 2d 600.

No. 79–1064. HANKINSON *v.* RUHLMAN. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 605 F. 2d 1197.

*Rehearing Denied*

No. 79–681. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL., 444 U. S. 1011;

No. 79–810. KNAPP *v.* KENTUCKY, 444 U. S. 1018;

No. 79–5305. NEUMANN *v.* UNITED STATES, 444 U. S. 1019;

No. 79–5558. EATON *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES, 444 U. S. 1046;

No. 79–5604. LOCKETT *v.* BLACKBURN, WARDEN, 444 U. S. 1010; and

No. 79–5627. SANDERS ET AL. *v.* TARBUTTON ET AL., 444 U. S. 1023. Petitions for rehearing denied.

No. 79–5114. WARREN *v.* MISSISSIPPI, 444 U. S. 956. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

MARCH 3, 1980

*Appeals Dismissed*

No. 79–928. BRIDGEPORT HYDRAULIC CO. ET AL. *v.* DIVISION OF PUBLIC UTILITY CONTROL OF CONNECTICUT; and

No. 79–936. NEW HAVEN WATER CO. ET AL. *v.* DIVISION OF PUBLIC UTILITY CONTROL OF CONNECTICUT. Appeals from Super. Ct. Conn., Hartford-New Britain Jud. Dist., dismissed for want of substantial federal question.

No. 79–1073. MUTUAL OF OMAHA INSURANCE CO. *v.* EGAN. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 24 Cal. 3d 809, 600 P. 2d 141.

*Certiorari Granted—Vacated and Remanded*

No. 78–67. TRUSTEES OF BOSTON UNIVERSITY *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further

consideration in light of *NLRB* v. *Yeshiva University*, 444 U. S. 672 (1980). Reported below: 575 F. 2d 301.

*Miscellaneous Orders*

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motion for appointment of Special Master granted. Motion of Columbia Gas Transmission Corp. et al. for leave to file an answer to motion for appointment of Special Master granted.

It is ordered that John F. Davis, Esquire, of Washington, D. C., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

Motions of Columbia Gas Transmission Corp. et al. and New Jersey for leave to intervene referred to the Special Master. Motion of plaintiffs for judgment on the pleadings and motion of Columbia Gas Transmission Corp. et al. for leave to file motion for judgment on the pleadings referred to the Special Master. Motion of Associated Gas Distributors for leave to file a brief as *amicus curiae* referred to the Special Master. [For earlier order herein, see 442 U. S. 937.]

No. 84, Orig. UNITED STATES *v.* ALASKA. Motion for leave to file a counterclaim referred to the Special Master. [For earlier order herein, see, *e. g.*, 444 U. S. 1065.]

No. 79–289. PRUNEYARD SHOPPING CENTER ET AL. *v.* ROBINS ET AL. Sup. Ct. Cal. [Probable jurisdiction postponed, 444 U. S. 949.] Motion of Solicitor General for divided argument granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 79–703. CAREY, STATE'S ATTORNEY OF COOK COUNTY *v.* BROWN ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 444 U. S. 1011.] Motions of New England Legal Foundation and Pacific Legal Foundation et al. for leave to file briefs as *amici curiae* granted.

No. 79–1082. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 444 U. S. 1042.] Motion of the Solicitor General for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

*Certiorari Granted*

No. 79–824. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–825. INSILCO BROADCASTING CORP. ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–826. AMERICAN BROADCASTING COS., INC., ET AL. *v.* WNCN LISTENERS GUILD ET AL.; and

No. 79–827. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* WNCN LISTENERS GUILD ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of two hours allotted for oral argument. Reported below: 197 U. S. App. D. C. 319, 610 F. 2d 838.

*Certiorari Denied.* (See also No. 79–1073, *supra.*)

No. 79–374. BIRMINGHAM TRUST NATIONAL BANK *v.* HARRISON ET AL.; and

No. 79–386. HARRISON *v.* BIRMINGHAM TRUST NATIONAL BANK ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 371 So. 2d 883.

No. 79–729. MILLICAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 273.

No. 79–784. GROVER, TRUSTEE IN BANKRUPTCY *v.* COUNTY OF NAPA. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 181.

No. 79–790. COMMITTEE FOR AUTO RESPONSIBILITY ET AL. *v.* FREEMAN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 195 U. S. App. D. C. 410, 603 F. 2d 992.

No. 79–815. DIPALERMO *v.* UNITED STATES; and

No. 79–819. LOMBARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 606 F. 2d 17.

No. 79–876. MCILVANE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–956. FORT VANCOUVER PLYWOOD CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 596.

No. 79–963. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 186.

No. 79–973. BURGETT ET UX. *v.* FEDERAL LAND BANK OF WICHITA. Sup. Ct. N. M. Certiorari denied.

No. 79–984. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, LOCAL 433 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 770.

No. 79–1006. FIRST MULTIFUND FOR DAILY INCOME, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 221 Ct. Cl. 123, 602 F. 2d 332.

No. 79–1055. FEDERAL ENERGY REGULATORY COMMISSION *v.* UNITED GAS PIPE LINE CO. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 581.

No. 79–1058. CHAMPION SPARK PLUG CO. *v.* GYROMAT CORP. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 361.

No. 79–1071. ARKANSAS LOUISIANA GAS CO. *v.* LUSTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 604 F. 2d 31.

No. 79–1072. FLORES *v.* CABOT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 385.

No. 79–1075. GUYTON, A MINOR BY SHEPHERD, ADMINISTRATRIX *v.* JENSEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 606 F. 2d 248.

No. 79–1076. TRUSTEES OF THE OPERATING ENGINEERS PENSION TRUST ET AL. *v.* PILATTI. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 96 Cal. App. 3d 63, 157 Cal. Rptr. 594.

No. 79–1077. GALICH *v.* CATHOLIC BISHOP OF CHICAGO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 538, 394 N. E. 2d 572.

No. 79–1079. ROHRER *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 589 S. W. 2d 121.

No. 79–1085. LUMPKIN *v.* CITY OF LITTLE ROCK. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 291.

No. 79–1087. LEEWARD PETROLEUM, LTD. *v.* MENE GRANDE OIL CO. ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–1088. BORA *v.* MITCHELL BROTHERS FILM GROUP ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 852.

No. 79–1091. NODVIN *v.* NODVIN. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 447, 259 S. E. 2d 636.

No. 79–1129. MANSION HOUSE CENTER NORTH REDEVELOPMENT CO. ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 1090.

No. 79–1137. FOTOMAT CORP. *v.* PHOTOVEST CORP. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 704.

No. 79–1167. GOLDSMITH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 79–5360. MORRIS *v.* CATE-McLAURIN CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1048.

No. 79–5551. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1193.

No. 79–5639. KING *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 374 So. 2d 808.

No. 79–5662. FEASTER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79–5663. WILLIAMS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79–5672. SHIELDS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 76 Ill. 2d 543, 394 N. E. 2d 1161.

No. 79–5693. BRYANT *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 809.

No. 79–5697. LOUDHAWK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1139.

No. 79–5725. WILLERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1375.

No. 79–5726. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 608 F. 2d 698.

No. 79–5762. MALONEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 222.

No. 79–5769. DALL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 608 F. 2d 910.

No. 79–5842. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5851. ALSTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 276, 609 F. 2d 531.

No. 79–5864. EVANS V. STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 507.

No. 79–5894. CHAPMAN *v.* JAGO, CORRECTIONAL SUPERINTENDANT. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 580.

No. 79–5917. HUNT *v.* GREENBERG, DISTRICT ATTORNEY OF ALBANY COUNTY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–5918. TINDER *v.* SISTER ROSE PAULA ET AL. C. A. 1st Cir. Certiorari denied.

No. 79–5934. MILLER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 79–5936. HENTGES *v.* TORAL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–5939. SHAFFNER *v.* WADE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 582.

No. 79–5950. CAMPBELL ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 922.

No. 79–5973. SELLARS *v.* COMMUNITY RELEASE BOARD OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 563.

No. 79–5978. BROWN *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79–6023. JOHNSON *v.* HANBERRY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1371.

No. 79–6024. MITCHELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 2d 779.

No. 79–6030. MCMILLIAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 611 F. 2d 257.

No. 79–6032. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–6034. SHUCKAHOSEE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 609 F. 2d 1351.

No. 79–6048. IVES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 930.

No. 79–6060. DUPREE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 606 F. 2d 829.

No. 79–608. TEXAS *v.* MIXON; and TEXAS *v.* DIXON. Ct. Crim. App. Tex. Motion of respondent Mixon for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 583 S. W. 2d 378 (first case); 583 S. W. 2d 793 (second case).

No. 79–1084. ESTELLE, CORRECTIONS DIRECTOR *v.* CORPUS ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 605 F. 2d 175.

No. 79–949. TEXAS *v.* REYNOLDS; and TEXAS *v.* COLUNGA. Ct. Crim. App. Tex. Motion of respondent Reynolds for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 588 S. W. 2d 900 (first case); 587 S. W. 2d 426 (second case).

No. 79–962. TENNESSEE GAS PIPELINE CO., A DIVISION OF TENNECO, INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Motion of petitioner to defer consideration of petition for writ of certiorari and certiorari denied. Reported below: 196 U. S. App. D. C. 187, 606 F. 2d 1094.

No. 79–5942. GIBSON *v.* RICKETTS, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 482, 260 S. E. 2d 877.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

*Rehearing Denied*

No. 78–1143. VANCE, SECRETARY OF STATE *v.* TERRAZAS, 444 U. S. 252;

No. 78–1268. MARTINEZ ET AL. *v.* CALIFORNIA ET AL., 444 U. S. 277;

No. 79–766. MCGHEE *v.* IOWA, 444 U. S. 1039;

No. 79–5481. MCELROY *v.* WILSON ET AL., 444 U. S. 971; and

No. 79–5698. FRANCISSE *v.* HOLLYWOOD CHEROKEE APARTMENTS ET AL., 444 U. S. 1047. Petitions for rehearing denied.

MARCH 17, 1980

*Affirmed on Appeal*

No. 79–923. STEIN, SECRETARY OF THE BUSINESS AND TRANSPORTATION AGENCY OF CALIFORNIA *v.* CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS ET AL. Appeal from C. A. 9th Cir. Motions of NAACP Legal Defense & Educational Fund, Inc., and American Savings & Loan League for leave to file briefs as *amici curiae* granted. Judgment affirmed. Reported below: 604 F. 2d 1256.

*Appeals Dismissed*

No. 79–996. CARGILL, ADMINISTRATOR, ET AL. *v.* CITY OF ROCHESTER, NEW HAMPSHIRE. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Reported below: 119 N. H. 661, 406 A. 2d 704.

No. 79–6075. CONRAD *v.* GREENE, U. S. DISTRICT JUDGE, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

No. 79–1102. PICKERING *v.* COUNTY OF ERIE, NEW YORK. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 614 F. 2d 1289.

No. 79–1132. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. *v.* COMMISSIONER OF LABOR AND INDUSTRY OF MONTANA. Appeal from Sup. Ct. Mont. dismissed for want of substantial federal question. Reported below: —— Mont. ——, 608 P. 2d 1047.

No. 79–1158. RICCO *v.* OHIO. Appeal from Ct. App. Ohio, Cuyahoga County, dismissed for want of substantial federal question.

*Certiorari Granted—Reversed and Remanded.* (See No. 79–797, *ante*, p. 193.)

*Certiorari Granted—Vacated and Remanded*

No. 78–1849. ATTORNEY GENERAL OF NEW YORK *v.* SHARGEL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Apfelbaum*, *ante*, p. 115. Reported below: 596 F. 2d 42.

No. 79–5731. BROWN *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his memorandum filed February 15, 1980.

*Miscellaneous Orders*

No. A–682. MCGOFF ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. Application for stay of order of the United States District Court for the District of Columbia entered December 12, 1979, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–697. HUDSPETH *v.* THURMAN. 147th Jud. Dist. Ct. Tex., Travis County. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–720. ANDRUS, SECRETARY OF THE INTERIOR *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL.; and

No. A–725. VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., ET AL. *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN. INC., ET AL. Applications for stay of judgment of the United States District Court for the Western District of Virginia, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending timely filing and disposition of the appeals in this Court.

No. A–747. FEDERATION FOR AMERICAN IMMIGRATION REFORM ET AL. *v.* KLUTZNICK, SECRETARY OF COMMERCE, ET AL. D. C. D. C. Application for injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Motion to treat the application as a statement as to jurisdiction denied.

No. A–758. HALSTON BUILDERS ASSOCIATES ET AL. *v.* KRAMER, TAX COLLECTOR FOR HAMILTON TOWNSHIP, ET AL. Application for stay of judgment of the Supreme Court of New Jersey, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE BLACKMUN would grant the application.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of Alabama for entry of a supplemental decree and cross-motion of the United States for entry of a supplemental decree referred to the Special Master. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, *ante*, p. 901.]

No. 79–1. AMERICAN EXPORT LINES, INC. *v.* ALVEZ ET AL. Ct. App. N. Y. [Certiorari granted, 444 U. S. 924.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 79–48. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* GLOVER CONSTRUCTION CO. C. A. 10th Cir. [Certiorari granted, 444 U. S. 962.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 79–66. AARON *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. [Certiorari granted, 444 U. S. 914.] Motion of Securities Industry Association for leave to file a supplemental brief as *amicus curiae* after argument denied.

No. 79–116. THOMAS *v.* WASHINGTON GAS LIGHT CO. ET AL. C. A. 4th Cir. [Certiorari granted, 444 U. S. 962.] Motion of the Solicitor General to permit Alan I. Horowitz, Esquire, to present oral argument *pro hac vice* granted.

No. 79–602. AGINS ET UX. *v.* CITY OF TIBURON. Sup. Ct. Cal. [Probable jurisdiction noted, 444 U. S. 1011.] Motion of appellants for additional time for oral argument, or in the alternative for divided argument, denied.

No. 79–616. MOHASCO CORP. *v.* SILVER. C. A. 2d Cir. [Certiorari granted, 444 U. S. 990.] Motion of the Solicitor General for divided argument granted.

No. 79–639. UNITED STATES *v.* SIOUX NATION OF INDIANS ET AL. Ct. Cl. [Certiorari granted, 444 U. S. 989.] Motion of Indian Law Resource Center for leave to file a brief as *amicus curiae* granted.

No. 79–703. CAREY, STATE'S ATTORNEY OF COOK COUNTY *v.* BROWN ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 444 U. S. 1011.] Motion of Paul P. Biebel, Jr., Esquire, to permit Ellen G. Robinson to present oral argument *pro hac vice* granted.

No. 79–880. KISSINGER ET AL. *v.* HALPERIN ET AL. C. A. D. C. Cir. Motion of respondents to defer filing of a brief in opposition denied, and respondents are allowed 30 days in which to file the brief. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this order.

No. 79–1268. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. D. C. E. D. N. Y. [Probable jurisdiction noted, 444 U. S. 1069.] Motion of the Solicitor General to dispense with printing the District Court's opinion and accompanying annex, granted.

No. A–731 (79–1190). LaSalle National Bank, Trustee, et al. *v.* Peoples Gas Light & Coke Co. App. Ct. Ill., 1st Dist. Application for stay, addressed to Mr. Justice Brennan and referred to the Court, denied.

No. A–760 (79–1384). Exxon Corp. *v.* United States; No. A–756 (79–1394). Shell Oil Co. *v.* United States; and

No. A–761 (79–1395). Marathon Oil Co. *v.* United States. Applications for stay of order of the United States District Court for the District of Columbia, entered December 17, 1979, as affirmed and modified by the United States Court of Appeals for the District of Columbia Circuit on February 25, 1980, denied.

No. 79–5364. Brown *v.* Louisiana. Sup. Ct. La. [Certiorari granted, 444 U. S. 990.] Motion of Louise Korns to permit Thomas Chester, Esquire, to present oral argument *pro hac vice* granted.

*Probable Jurisdiction Noted*

No. 79–1033. Webb's Fabulous Pharmacies, Inc., et al. *v.* Beckwith, Clerk of the Circuit Court of Seminole County, et al. Appeal from Sup. Ct. Fla. Probable jurisdiction noted. Reported below: 374 So. 2d 951.

*Certiorari Granted*

No. 78–1945. Universities Research Assn., Inc. *v.* Coutu. C. A. 7th Cir. Certiorari granted. Reported below: 595 F. 2d 396.

No. 79–886. Upjohn Co. et al. *v.* United States et al. C. A. 6th Cir. Certiorari granted. Reported below: 600 F. 2d 1223.

No. 79–1157. Rosewell, Treasurer of Cook County, Illinois, et al. *v.* LaSalle National Bank, Trustee. C. A. 7th Cir. Certiorari granted. Reported below: 604 F. 2d 530.

No. 79–408. CITY OF MILWAUKEE ET AL. *v.* ILLINOIS ET AL. C. A. 7th Cir. Motions of Mid-America Legal Foundation and Association of Metropolitan Sewerage Agencies et al. for leave to file briefs as *amici curiae* and certiorari granted. Reported below: 599 F. 2d 151.

No. 79–855. DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* BRADLEY ET AL. C. C. P. A. Certiorari granted and case set for oral argument in tandem with No. 79–1112, *Diamond* v. *Diehr, infra.* Reported below: 600 F. 2d 807.

No. 79–1068. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* ASSOCIATED DRY GOODS CORP. C. A. 4th Cir. Certiorari granted. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 607 F. 2d 1075.

No. 79–1112. DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* DIEHR ET AL. C. C. P. A. Certiorari granted and case set for oral argument in tandem with No. 79–855, *Diamond* v. *Bradley, supra.* Reported below: 602 F. 2d 982.

No. 79–1127. ESTELLE, CORRECTIONS DIRECTOR *v.* SMITH. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 602 F. 2d 694.

No. 79–5949. WATKINS *v.* BORDENKIRCHER, WARDEN; and No. 79–5951. SUMMITT *v.* BORDENKIRCHER, WARDEN. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari in No. 79–5949 granted limited to Question 1 presented by the petition. Certiorari in No. 79–5951 granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 608 F. 2d 247.

No. 79–5780. WEAVER *v.* GRAHAM, GOVERNOR OF FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 376 So. 2d 855.

*Certiorari Denied.* (See also No. 79–1102, *supra.*)

No. 78–1924. GOLAND ET AL. *v.* CENTRAL INTELLIGENCE AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 25, 607 F. 2d 339.

No. 79–854. BERGER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 150 Ga. App. 166, 257 S. E. 2d 8.

No. 79–896. HUBER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 387.

No. 79–899. GEORGE BANTA CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 604 F. 2d 830.

No. 79–903. POSNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1007.

No. 79–917. LECOMPTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 81.

No. 79–929. RSR CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 1317.

No. 79–932. WARINNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 607 F. 2d 210.

No. 79–965. MICHIGAN *v.* YOUNG. Ct. App. Mich. Certiorari denied. Reported below: 89 Mich. App. 753, 282 N. W. 2d 211.

No. 79–980. MORTON-NORWICH PRODUCTS, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 221 Ct. Cl. 83, 602 F. 2d 270.

No. 79–986. CURRIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 609 F. 2d 1193.

No. 79–1000. DICHNE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 632.

No. 79–1017. SORKIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79–1019. RANEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 820.

No. 79–1031. SOUTHWEST TEXAS METHODIST HOSPITAL *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 63.

No. 79–1039. WILLIAM C. HAAS & CO., INC. *v.* CITY AND COUNTY OF SAN FRANCISCO. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 1117.

No. 79–1047. MIROFF ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 777.

No. 79–1053. BLEVINAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1124.

No. 79–1069. RONCI MANUFACTURING CO., INC. *v.* RHODE ISLAND ET AL. Sup. Ct. R. I. Certiorari denied. Reported below: — R. I. —, 403 A. 2d 1094.

No. 79–1093. BLY ET AL. *v.* MCLEOD, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 134.

No. 79–1106. ZAMBITO *v.* BLAIR, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 1192.

No. 79–1107. YOTT *v.* NORTH AMERICAN ROCKWELL CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 904.

No. 79–1111. TALMAN FEDERAL SAVINGS & LOAN ASSOCIATION OF CHICAGO *v.* CARROLL. C. A. 7th Cir. Certiorari denied. Reported below: 604 F. 2d 1028.

No. 79–1117. HARVEY *v.* HARRIS TRUST & SAVINGS BANK. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 280, 391 N. E. 2d 461.

No. 79–1119. AMERICAN INTERINSURANCE EXCHANGE *v.* COMMERCIAL UNION ASSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 731.

No. 79–1126. THOMAS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 77 Ill. 2d 396, 396 N. E. 2d 812.

No. 79–1133. CLAWSON, ADMINISTRATRIX *v.* INTERNATIONAL HARVESTER CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79–1134. GOLDMAN *v.* SEARS, ROEBUCK & CO. C. A. 1st Cir. Certiorari denied. Reported below: 607 F. 2d 1014.

No. 79–1135. CANADIAN UNIVERSAL INSURANCE CO. *v.* CONTINENTAL CASUALTY CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 1340.

No. 79–1140. BURDETTE *v.* INDIANA & MICHIGAN ELECTRIC CO. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1001.

No. 79–1142. CHRISTIAN BEACON PRESS, INC. *v.* CITY OF CAPE MAY. Super. Ct. N. J. Certiorari denied.

No. 79–1153. KEM MANUFACTURING CO., INC. *v.* DRACKETT PRODUCTS CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 402 and 604 F. 2d 320.

No. 79–1154. COLAO ET AL. *v.* MERIT INSURANCE CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 654.

No. 79–1159. POOL, ADMINISTRATOR *v.* DOWNTOWN NURSING HOME, INC. Sup. Ct. Ala. Certiorari denied. Reported below: 375 So. 2d 465.

No. 79–1160. VALERON CORP. *v.* GENERAL ELECTRIC CO. C. A. 6th Cir. Certiorari denied. Reported below: 608 F. 2d 265.

No. 79–1174. MARC RICH & CO., A. G. *v.* TRANSMARINE SEAWAYS CORP. OF MONROVIA. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79–1185. AMBROSIANI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 610 F. 2d 65.

No. 79–1191. BORCHERDING ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79–1208. LONG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1372.

No. 79–1211. FRINK *v.* UNITED STATES NAVY PERA (CRUDES) ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79–1218. MCCARTY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 611 F. 2d 220.

No. 79–1219. SIMS, TRUSTEE, ET AL. *v.* MACK TRUCKS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 608 F. 2d 87.

No. 79–1223. KIRVEN *v.* COMMITTEE ON CHARACTER AND FITNESS OF THE SOUTH CAROLINA SUPREME COURT. Sup. Ct. S. C. Certiorari denied.

No. 79–1275. ORTIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 280.

No. 79–1279. CARTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 2.

No. 79–5549. HOUSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 604 F. 2d 1135.

No. 79–5670. HOLLAND *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 91 Wis. 2d 134, 280 N. W. 2d 288.

No. 79–5721. PRIVETT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 79–5727. IN RE A. G. M. Ct. App. D. C. Certiorari denied.

No. 79–5742. TIAO-MING WU *v.* NEW YORK CITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1293.

No. 79–5760. BISHOP *v.* LANE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 556.

No. 79–5779. RACKSTRAW *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 79–5817. VON ESSEN *v.* MCKEAN, FORMERLY VON ESSEN. Sup. Ct. Wash. Certiorari denied.

No. 79–5823. JOHNSON *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 615 F. 2d 1351.

No. 79–5825. EVERAGE *v.* GIBSON ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 372 So. 2d 829.

No. 79–5838. PRESSLEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79–5840. LOPEZ-BELTRAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 619 F. 2d 19.

No. 79–5846. GRUBBS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79–5863. GODWIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 808.

No. 79–5872. HARRISON *v.* NAIFEH, JUDGE, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 79–5892. ALTRO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–5919. TRIMBLE *v.* CONLEY, JUDGE, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 79–5947. WEXLER *v.* PHILADELPHIA CONSUMER DISCOUNT CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 576.

No. 79–5952. GINTER *v.* WALLIN ET AL. C. A. 8th Cir. Certiorari denied.

No. 79–5956. GRISSO *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 79–5961. CUPPS *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 10th Cir. Certiorari denied.

No. 79–5968. MABERY *v.* NEW YORK STATE PAROLE COMMISSION. C. A. 2d Cir. Certiorari denied.

No. 79–5970. MICKENS *v.* TOWNLEY. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1002.

No. 79–5971. GRIFFIN *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 372.

No. 79–5979. RIVERA ET AL. *v.* AQUEDUCT AND SEWER AUTHORITY OF PUERTO RICO. Sup. Ct. P. R. Certiorari denied.

No. 79–5982. STEBBINS *v.* PEOPLES LIFE INSURANCE CO. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 180, 607 F. 2d 494.

No. 79–5984. WIMBUSH *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1208.

No. 79–5989. BECKNELL *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–6003. MCDOUGLE ET AL. *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1203.

No. 79–6006. LITTLE *v.* CITY OF JACKSON. Sup. Ct. Miss. Certiorari denied. Reported below: 375 So. 2d 1031.

No. 79–6007. SMITH *v.* CITY OF BELLINGHAM. Ct. App. Wash. Certiorari denied.

No. 79–6008. KENT *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 319.

No. 79–6009. INDIVIGLIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 624.

No. 79–6011. HOLSEY *v.* INMATE GRIEVANCE COMMISSION. Ct. Sp. App. Md. Certiorari denied.

No. 79–6013. MONK ET AL. *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 837.

No. 79–6014. HERNANDEZ *v.* ELIO M. ROSSY, INC., ET AL. Sup. Ct. P. R. Certiorari denied.

No. 79–6018. STEELE *v.* BARRETT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 563.

No. 79–6036. FROEMBGEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79–6042. KINARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 881.

No. 79–6056. DE FAZIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 771.

No. 79–6061. WIDEMON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–6066. FRIEDMAN *v.* FAIRHILL HOSPITAL ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 79–6078. WHITNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 237.

No. 79–6086. GAMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79–6088. PROSAK *v.* BOEING CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1196.

No. 79–6096. BUSH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79–6104. FRYE ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 58, 610 F. 2d 1000.

No. 79–6107. JOSEPH *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 572.

No. 79–6109. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 735.

No. 79–6112. WILLIAMS *v.* DUCKWORTH, WARDEN. Sup. Ct. Ind. Certiorari denied.

No. 79–697. ENCYCLOPAEDIA BRITANNICA, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 605 F. 2d 964.

No. 79–804. CLEVELAND BOARD OF EDUCATION ET AL. *v.* REED ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 607 F. 2d 714.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

Petitioners seek to present two questions for decision: (a) whether the District Court properly found systemwide segregative intent on the part of petitioner school Board, and, (b) "[w]hether the systemwide student reassignment plan ordered by the District Court, whereby every grade in every school must have a ratio of black and white students in approximate proportion to the systemwide ratio, exceeded the violation found, particularly where the evidence showed that Cleveland's residential areas are highly segregated by race." Pet. for Cert. 3. With respect to the first issue of systemwide desegregation, the District Court found as follows in its exhaustive opinion:

> "[T]he local defendants offered evidence to show that various actions complained of by the plaintiffs were supported by valid, racially neutral, educationally sound reasons. For instance, the defendants argued that they created optional attendance zones to permit students to avoid heavy traffic or other such safety hazards, or to address the problems of overcrowding. Various school construction decisions were defended as being responsive to sincere desires of local residents for neighborhood facilities. The assignment of black teachers and administrators to schools with majority black student enrollments was defended on the ground that such faculty or staff would be better able to relate to students of the same race. Where there was factual support for the claim that such decisions had compelling educational bases, or where legitimate safety concerns were being met in a plausible and nonracial manner, the allegations of the plaintiffs were set aside. However, there remain

more than 200 enumerated actions cited in the liability opinion for which the explanations of the defendants either were not credible or were not legally permissible. In these instances, the Court finds that the defendants acted (1) *not only* with awareness of the natural, probable, and foreseeable consequences of their acts, (2) *but also* with the purpose and intent to maintain racial segregation." *Reed* v. *Rhodes*, 455 F. Supp. 546, 555 (ND Ohio 1978).

The Court of Appeals affirmed this conclusion of the District Court in this language:

"Our review of this record supports the District Judge's findings of fact in this regard and we find no fault in his conclusions of law, as stated above. The findings of fact certainly cannot be termed clearly erroneous, and the conclusions of law which pertain to his 1973 findings and his 1964 findings are both entirely consistent with the opinions of the Supreme Court in *Columbus Board of Education* v. *Penick*, [443] U. S. [449] (1979), and *Dayton Board of Education* v. *Brinkman*, [443] U. S. [526] (1979)." *Reed* v. *Rhodes*, 607 F. 2d 714, 717 (CA6 1979).

The Court of Appeals, I think, was undoubtedly correct in upholding this District Court's finding of systemwide segregative intent on the basis of this Court's decisions last Term in the *Columbus* and *Dayton* cases. I would therefore not vote to grant the petition on this first issue.

The Court of Appeals, however, devoted virtually no attention to the second issue—the propriety of the *remedy* imposed by the District Court. In the Court of Appeals' opinion, which comprises 46 pages of the appendix to the petition, less than 4 are devoted to the propriety of the remedy decreed, and none of these 4 pages deal with whether the remedy was appropriate, *conceding* that a systemwide remedy could be imposed. The court focused solely on the legitimacy

of imposing a systemwide remedy, neglecting to address the propriety of the *terms* imposed by that remedy. The Court of Appeals extensively quoted language in this Court's opinion in *Columbus, supra,* to support its approval of this remedy, but that language simply has no application to the issue of whether as drastic a remedy as this may be imposed once a systemwide violation has been found.

In *Milliken* v. *Bradley,* 418 U. S. 717, 744 (1974), we held:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann* [v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971)], at 16."

This was not a novel principle then any more than it is now. It simply reflects the traditional rule that the remedy imposed by a United States district court exercising its equitable powers must restore, as nearly as possible, the situation which would have existed had the wrong not occurred. We have certainly never held that racial balance is constitutionally required once a violation is established. To the contrary, in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 24 (1971), this Court stated explicitly that, "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

The District Court then either ignored the statement in *Swann* or formulated this remedy on the hypothesis that had there been no segregative conduct on the part of the Cleveland School Board, there would have been no racially segregated housing patterns in the city of Cleveland. For the reasons persuasively stated by MR. JUSTICE POWELL in his opinion dissenting from the dismissal of the writ of certiorari in *Estes* v. *Metropolitan Branch, Dallas NAACP,* 444 U. S. 437, 438 (1980), this is simply not a realistic hypothesis. Conceding that there was a systemwide violation, and allowing for

the discretion and flexibility necessary for the District Court to fashion an equitable decree which would requite the constitutional wrong, that discretion did not extend to restructuring the entire demography of the city of Cleveland as reflected in its schools, unless that demography was attributable to the conduct of the petitioner school Board. While the District Court found that some of the racial housing patterns *were* attributable to the conduct of the Board, it also made clear that other factors, including the location of public housing by entities other than the Board, also had a causative effect. Even if the Constitution required it, and it were possible for federal courts to do it, no equitable decree can fashion an "Emerald City" where all races, ethnic groups, and persons of various income levels live side by side in a large metropolitan area. Because the decree of the District Court here seems flatly contrary to the language of *Swann, supra,* and *Milliken, supra,* I would grant the petition for certiorari limited to the second question.

No. 79–994. EL PASO NATURAL GAS CO. *v.* ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 123 Ariz. 219, 599 P. 2d 175.

No. 79–1172. HARVEY *v.* HARRIS. C. A. 7th Cir. Motion of Voluntary Association of Trial Judges of Wisconsin for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 605 F. 2d 330.

No. 79–5626. SIMON *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 606 F. 2d 320.

No. 79–5933. DOUTHIT *v.* GEORGIA; and
No. 79–5959. GATES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79–5933, 239 Ga. 81, 235

S. E. 2d 493, and 244 Ga. 471, 260 S. E. 2d 875; No. 79–5959, 244 Ga. 587, 261 S. E. 2d 349.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

*Rehearing Denied*

No. 27, Orig. OHIO *v.* KENTUCKY, 444 U. S. 335;

No. 79–486. UNITED STATES STEEL CORP. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 444 U. S. 1035;

No. 79–531. NEWELL ET AL. *v.* ORLEANS PARISH SCHOOL BOARD, 444 U. S. 1043; and

No. 79–5669. PFISTER *v.* ANDERSON CLINIC, INC., ET AL., 444 U. S. 1047. Petitions for rehearing denied.

MARCH 24, 1980

*Vacated and Remanded on Appeal*

No. 78–1839. ASARCO INC. (FORMERLY AMERICAN SMELTING & REFINING CO.) *v.* IDAHO STATE TAX COMMISSION. Appeal from Sup. Ct. Idaho. Judgment vacated and case remanded for further consideration in light of *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, ante*, p. 425. Reported below: 99 Idaho 924, 592 P. 2d 39.

*Appeals Dismissed*

No. 79–1143. RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC. *v.* MIKOS, PROPERTY APPRAISER OF SARASOTA COUNTY, FLORIDA, ET AL. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of substantial federal question. MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 368 So. 2d 884.

No. 79–1182. RUSSO, TRUSTEE, ET AL. *v.* TOWN OF EAST HARTFORD. Appeal from Sup. Ct. Conn., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 179 Conn. 250, 425 A. 2d 1282.

No. 79–1284. KNEELAND *v.* NEW ENGLAND MERCHANTS NATIONAL BANK ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 607 F. 2d 993.

*Certiorari Granted—Vacated and Remanded*

No. 78–1008. SATTERWHITE *v.* CITY OF GREENVILLE, TEXAS. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States Parole Comm'n* v. *Geraghty, ante,* p. 388, and *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. 326. Reported below: 578 F. 2d 987.

No. 79–5649. ARMOUR *v.* CITY OF ANNISTON, DBA ANNISTON MEMORIAL HOSPITAL, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States Parole Comm'n* v. *Geraghty, ante,* p. 388, and *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. 326. Reported below: 597 F. 2d 46.

*Miscellaneous Orders*

No. A–735. HEIR ET AL. *v.* DEGNAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. Application for stay of judgment of the Supreme Court of New Jersey, addressed to MR. JUSTICE POWELL and referred to the Court, denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. A–776. FREEDOM INSTITUTE OF AMERICA ET AL. *v.* NEW JERSEY. Application for stay of orders of the Supreme Court of New Jersey, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A–784. SHARPE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Application for stay and/or continued release on bond, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. 81, Orig. KENTUCKY *v.* INDIANA ET AL. Report of the Special Master received and ordered filed. Motion of Public Service Company of Indiana, Inc., for leave to intervene denied. Motion of Public Service Company of Indiana, Inc., for leave to file a brief as *amicus curiae* granted. Motion for summary adoption of the Report of the Special Master granted and case remanded to the Special Master so that with the cooperation of the parties he may prepare and submit to the Court an appropriate form of decree. [For earlier order herein, see, *e. g.*, 444 U. S. 816.]

No. 79–1203. LUCKY MC URANIUM CORP. *v.* GEOMET EXPLORATION, LTD. Sup. Ct. Ariz. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 79–1268. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. D. C. E. D. N. Y. [Probable jurisdiction noted, 444 U. S. 1069.] Motion of Alan Ernest to be appointed as counsel for children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 79–1298. UNKNOWN NAMED CHILDREN UNBORN AND BORN ALIVE *v.* GREENE, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of habeas corpus denied.

No. 79–1300. DACEY *v.* NARUK ET AL. Motion for leave to file petition for writ of mandamus denied.

*Probable Jurisdiction Noted*

No. 79–5932. DOE ET AL. *v.* DELAWARE. Appeal from Sup. Ct. Del. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 407 A. 2d 198.

*Certiorari Granted*

No. 79–1186. DENNIS *v.* SPARKS ET AL., DBA SIDNEY A. SPARKS, TRUSTEE. C. A. 5th Cir. Certiorari granted. Reported below: 604 F. 2d 976.

*Certiorari Denied.* (See also Nos. 79–1182 and 79–1284, *supra.*)

No. 78–1169. LINCOLN AMERICAN CORP. ET AL. *v.* SUSMAN; and

No. 78–1286. EBERSTADT ET AL. *v.* FLAMM ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 587 F. 2d 866.

No. 79–822. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–910. HOROWITZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–969. KRASNY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 840.

No. 79–978. YOUNG ET UX. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 143.

No. 79–979. WILLAMETTE IRON & STEEL CO. *v.* SECRETARY OF LABOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 1177.

No. 79–1020. NEWMAN *v.* ELROD, SHERIFF. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 72 Ill. App. 3d 616, 391 N. E. 2d 37.

No. 79–1022. PATRICK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 730.

No. 79–1059. SAWYER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1190.

No. 79–1070. REFRACTARIOS MONTERREY, S. A. *v.* FERRO CORP. ET AL. C. C. P. A. Certiorari denied. Reported below: 606 F. 2d 966.

No. 79–1162. CUEVAS ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 151 Ga. App. 605, 260 S. E. 2d 737.

No. 79–1173. STEMPER *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No 79–1189. MAHOMET *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 151 Ga. App. 462, 260 S. E. 2d 363.

No. 79–1190. LASALLE NATIONAL BANK, TRUSTEE, ET AL. *v.* PEOPLES GAS LIGHT & COKE CO. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 79–1226. DITTO *v.* ROSENDALE. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79–1239. SPARKS ET AL., DBA SIDNEY A. SPARKS, TRUSTEE *v.* DUVAL COUNTY RANCH CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 976.

No. 79–1254. SANZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 219.

No. 79–1267. GARCIA *v.* KUEHN, AKA KELLER. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 1143.

No. 79–1301. GOREL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 79–5775. GRAY *v.* ROWLEY. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 382.

No. 79–5782. EDDINGTON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 77 Ill. 2d 41, 394 N. E. 2d 1185.

No. 79–5791. GRAY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 77 Ill. 2d 75, 394 N. E. 2d 1194.

No. 79–5809. BOIGNER *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79–5826. BLANCHARD *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 95.

No. 79–5844. GALE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 72 Ill. App. 3d 23, 390 N. E. 2d 921.

No. 79–5871. ALTON ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79–5911. KNIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1311.

No. 79–5931. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–5945. FORCELLATI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 610 F. 2d 25.

No. 79–6004. LESSARD *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 79–6022. MURRAY *v.* STACK, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–6028. LOCKETT *v.* SOUTH CENTRAL BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 553.

No. 79–6046. LITTLEFIELD *v.* FORT DODGE MESSENGER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 581.

No. 79–6047. DYER *v.* CRISP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 2d 275.

No. 79–6062. COUSIN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 511.

No. 79–6089. O'CONNOR *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied.

No. 79–6095. LIGON *v.* CUYLER, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 573.

No. 79–6103. CAMPBELL *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 222 Ct. Cl. 563.

No. 79–6122. COOPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–6133. CAPPELLETTI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 313.

No. 79–6137. PERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 778.

No. 79–6156. GREENE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 79–584. RESEARCH EQUITY FUND, INC. *v.* INSURANCE COMPANY OF NORTH AMERICA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 602 F. 2d 200.

No. 79–656. MANCHESTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 605 F. 2d 1198.

No. 79–1009. ALEMAN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 609 F. 2d 298.

No. 79–5013. LITTLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 598 F. 2d 564.

No. 79–5571. ANTONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 603 F. 2d 535.

No. 79–5902. GISPERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 603 F. 2d 535.

No. 79–930. CALIFORNIA *v.* DALTON. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 24 Cal. 3d 850, 598 P. 2d 467.

No. 79–1015. LOMBARD, SHERIFF *v.* TAYLOR. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 606 F. 2d 371.

No. 79–5920. DIX *v.* GEORGIA; and

No. 79–5994. COLLIER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79–5920, 238 Ga. 209, 232 S. E. 2d 47, and 244 Ga. 464, 260 S. E. 2d 863; No. 79–5994, 244 Ga. 553, 261 S. E. 2d 364.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

*Rehearing Denied*

No. 79–955. DeHavilland Aircraft of Canada, Ltd. *v.* Betar, Public Administrator of Cook County, et al., 444 U. S. 1098; and

No. 79–5728. Ross *v.* Carey, Governor of New York, et al., 444 U. S. 1085. Petitions for rehearing denied.

No. 79–5447. In re Application for Admission to the Bar of Massachusetts, 444 U. S. 1046. Motion for leave to file petition for rehearing denied.

March 31, 1980

*Affirmed on Appeal*

No. 79–664. Ventura County *v.* Gulf Oil Corp. Affirmed on appeal from C. A. 9th Cir. Reported below: 601 F. 2d 1080.

*Appeal Dismissed*

No. 79–5877. Poe *v.* North Carolina. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Mr. Justice Brennan and Mr. Justice Stevens would note probable jurisdiction and set case for oral argument. Reported below: 298 N. C. 303, 259 S. E. 2d 304.

*Certiorari Granted—Vacated and Remanded*

No. 78–1391. Chateau X, Inc., et al. *v.* Andrews, District Attorney for the Fourth District of North Carolina. Sup. Ct. N. C. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Vance* v. *Universal Amusement Co., ante,* p. 308. Mr. Justice White dissents. Reported below: 296 N. C. 251, 250 S. E. 2d 603.

No. 79–482. Hutto, Corrections Director, et al. *v.* Davis. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rummel* v. *Estelle, ante,* p. 263. Reported below: 601 F. 2d 153.

*Miscellaneous Orders*

No. 79–4. WILLIAMS ET AL. *v.* ZBARAZ ET AL.;

No. 79–5. MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL.; and

No. 79–491. UNITED STATES *v.* ZBARAZ ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 444 U. S. 962]; and

No. 79–1268. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. D. C. E. D. N. Y. [Probable jurisdiction noted, 444 U. S. 1069.] Motion of the Solicitor General to consolidate the cases for oral argument denied. Motion of intervening appellees and appellees in No. 79–1268 for divided argument denied. Motion of Congressman Jim Wright et al. for leave to participate in oral argument as *amici curiae* in No. 79–1268 denied. Motions of Coalition for Human Justice and Bergen-Passaic Health Systems Agency for leave to file briefs as *amici curiae* in No. 79–1268 granted.

No. 79–669. DAWSON CHEMICAL CO. ET AL. *v.* ROHM & HAAS CO. C. A. 5th Cir. [Certiorari granted, 444 U. S. 1012.] Motions for leave to file briefs as *amici curiae* filed by the following were granted: Chemical Manufacturers Assn., Pharmaceutical Manufacturers Assn., New York Patent Law Assn., Licensing Executives Society (U.S.A.), Inc., American Chemical Society, National Agricultural Chemicals Assn., Society of University Patent Administrators et al., National Small Business Assn., and National Association of Manufacturers. Motion of American Patent Law Assn. for leave to join in the brief, *amicus curiae,* of the National Agricultural Chemicals Assn. denied. Motion of National Agricultural Chemicals Assn. for additional time for oral argument denied, but the alternative request for divided argument granted.

No. A–750 (79–1258). CONFEDERATION OF IRANIAN STUDENTS *v.* CIVILETTI, ATTORNEY GENERAL. C. A. D. C. Cir. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied. MR. JUSTICE BRENNAN would grant the application.

No. 79–5932. DOE ET AL. *v.* DELAWARE. Sup. Ct. Del. [Probable jurisdiction noted, *ante*, p. 942.] Motion to seal the record granted, and the parties are directed to proceed on the original record.

No. A–652 (79–6120). BRAZAS ET AL. *v.* UNITED STATES. C. A. 1st Cir. Application for stay, addressed to MR. JUSTICE STEWART and referred to the Court, denied.

No. 79–6064. TARKOWSKI *v.* GRADY, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

*Certiorari Granted*

No. 79–1171. MINNESOTA *v.* CLOVER LEAF CREAMERY CO. ET AL. Sup. Ct. Minn. Certiorari granted. Reported below: 289 N. W. 2d 79.

*Certiorari Denied*

No. 78–1347. WALL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 840.

No. 79–241. MISSOURI *v.* ALL STAR NEWS AGENCY, INC. Sup. Ct. Mo. Certiorari denied. Reported below: 580 S. W. 2d 245.

No. 79–357. THORNLOW *v.* THORNLOW. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 576 S. W. 2d 697.

No. 79–683. MISSOURI *v.* ALL STAR NEWS AGENCY, INC. Sup. Ct. Mo. Certiorari denied. Reported below: 588 S. W. 2d 494.

No. 79–698. BOTHMAN *v.* WARREN B. ET UX. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 92 Cal. App. 3d 796, 156 Cal. Rptr. 48.

No. 79–731. PORTER & DIETSCH, INC., ET AL. *v.* FEDERAL TRADE COMMISSION; and

No. 79–1090. PAY'N SAVE CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 294.

No. 79–751. SOTTO ET AL. *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 184.

No. 79–812. OSMOSE WOOD PRESERVING CO. OF AMERICA, INC., ET AL. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 562.

No. 79–902. FRIEDMAN *v.* HARBOLD. Ct. App. Ga. Certiorari denied. Reported below: 150 Ga. App. 482, 258 S. E. 2d 154.

No. 79–904. SELLINGER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 79–975. BELL *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1285.

No. 79–1078. PITTSBURGH METRO AREA POSTAL WORKERS UNION, AFL–CIO *v.* UNITED STATES POSTAL SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 503.

No. 79–1094. AUTHORIZED AIR CONDITIONING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 606 F. 2d 899.

No. 79–1097. FOWLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 181.

No. 79–1098. DIVIVO *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 611 F. 2d 492.

No. 79–1103. MENOMINEE TRIBE OF INDIANS ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 221 Ct. Cl. 506, 607 F. 2d 1335.

No. 79–1124. ILLINOIS ET AL. *v.* UNITED STATES ET AL.; and ILLINOIS ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 604 F. 2d 519 (first case); 624 F. 2d 1104 (second case).

No. 79–1163. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 70 Ill. App. 3d 1104, 392 N. E. 2d 803.

No. 79–1170. MCGRAW-EDISON CO. ET AL. *v.* FREMONT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 752.

No. 79–1177. MCBRIDE ET AL. *v.* ROCKEFELLER FAMILY FUND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 34.

No. 79–1201. WRIGHT *v.* WRIGHT. Sup. Ct. Wis. Certiorari denied. Reported below: 92 Wis. 2d 246, 284 N. W. 2d 894.

No. 79–1206. RUFFIN ET AL. *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1276.

No. 79–1207. LYLES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 587 S. W. 2d 717.

No. 79–1209. COASTAL CORP. ET AL. *v.* WEISBERG. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 2d 650.

No. 79–1215. LEIFER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 71 App. Div. 2d 1007, 420 N. Y. S. 2d 244.

No. 79–1224. GENERAL FOOTWEAR CO., LTD., ET AL. *v.* AMERICAN FOOTWEAR CORP. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 2d 655.

No. 79–1227. PELTZMAN *v.* AMERICAN RADIO ASSN. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1289.

No. 79–1232. JACKSON ET AL. *v.* HAYAKAWA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 1121.

No. 79–1257. SEXTON *v.* CLEVELAND ATHLETIC CLUB ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 79–1293. PLUMMER *v.* KLEPAK, CHAIRMAN, DRUG ABUSE CONTROL COMMISSION OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 48 N. Y. 2d 486, 399 N. E. 2d 897.

No. 79–5747. EDWARDS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–5778. LYKINS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 77 Ill. 2d 35, 394 N. E. 2d 1182.

No. 79–5820. KLOBUCHIR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 486 Pa. 241, 405 A. 2d 881.

No. 79–5821. ROGERS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 79–5831. MEYER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 150 Ga. App. 613, 258 S. E. 2d 217.

No. 79–5860. GOOLSBY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 70 Ill. App. 3d 832, 388 N. E. 2d 894.

No. 79–5867. JACKSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 226 Kan. 302, 597 P. 2d 255.

No. 79–5878. STREETER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 69 Ill. App. 3d 1100, 391 N. E. 2d 797.

No. 79–5899. BROWN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 77 Ill. 2d 531, 397 N. E. 2d 809.

No. 79–5900. KRALIK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 343.

No. 79–5937. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 582.

No. 79–5938. CLAYTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1207.

No. 79–6025. MAGEE *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 812.

No. 79–6038. BOWDEN *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 217.

No. 79–6051. BALLARD *v.* SMITH, WARDEN; and
No. 79–6052. CAMPBELL *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79–6054. BREWER *v.* BREWER. Sup. Ct. Ala. Certiorari denied.

No. 79–6059. MARTIN *v.* OHIO. Ct. App. Ohio, Lawrence County. Certiorari denied.

No. 79–6065. GROOMS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 344.

No. 79–6068. CARTER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 60 Ohio St. 2d 34, 396 N. E. 2d 757.

No. 79–6069. SANDERS, AKA TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–6072. FARRELL *v.* DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 79–6076. MASELLI *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1289.

No. 79–6091. PEREZ-HUERTA *v.* ST. FRANCIS COMMUNITY HOSPITAL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 813.

No. 79–6102. BULLOCK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 775.

No. 79–6127. BLAKE *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79–6130. MCCLANAHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 642.

No. 79–6151. HINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–6153. MERROW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–6154. WATSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79–6169. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1193.

No. 79–6171. ATTWELL ET AL. *v.* LASALLE NATIONAL BANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1157.

No. 79–6173. LEWIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–6185. ALANIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 123.

No. 79–6195. TILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 228.

No. 79–6197. MCQUIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1193.

No. 79–6074. POLLARD *v.* UNITED STATES TOBACCO CO. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 610 F. 2d 813.

*Rehearing Denied*

No. 79–5754. GINSBURG *v.* OVERLOOK HOSPITAL ET AL., 444 U. S. 1086;

No. 79–5755. SOLOMON *v.* FRAME ET AL., 444 U. S. 1086;

No. 79–5819. REED *v.* SCHWAB ET AL., 444 U. S. 1088; and

No. 79–5928. GAMBLE *v.* UNITED STATES, 444 U. S. 1092. Petitions for rehearing denied.

APRIL 14, 1980

*Affirmed on Appeal*

No. 79–1373. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 487 F. Supp. 280.

No. 79–1375. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Affirmed on appeal from C. A. 2d Cir. Reported below: 616 F. 2d 1.

*Appeals Dismissed*

No. 79–1152. HEFNER *v.* NEW ORLEANS PUBLIC SERVICE, INC., ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 605 F. 2d 893.

No. 79–5837. SWINK *v.* TEXAS. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: See 575 S. W. 2d 113.

No. 79–6090. WAYLAND *v.* TIFFANY ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 618 F. 2d 92.

No. 79–6084. SAVARIN *v.* NATIONAL BANK OF COMMERCE—MASTER CHARGE. Appeal from Ct. App. Tenn. dismissed for want of substantial federal question.

*Certiorari Granted—Vacated and Remanded*

No. 78–1803. UNITED STATES *v.* HUMPHRIES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Crews, ante,* p. 463. Reported below: 600 F. 2d 1238.

No. 79–1041. CALIFORNIA *v.* AUSTIN. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari granted, judgment vacated, and case remanded to consider whether judgment is based on federal or state constitutional grounds, or both.

*Miscellaneous Orders**

No. A–700. SCHULTZ *v.* FLORIDA ET AL. C. A. 5th Cir. Application for injunction and other relief, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

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*For the Court's orders prescribing Rules of Procedure for the Trial of Misdemeanors before United States Magistrates, see *post,* p. 976, and adopting amendments to the Rules of this Court, see *post,* p. 984.

No. A–831. Oil, Chemical & Atomic Workers International Union, AFL–CIO, Local 1–547 *v.* Goubeaux, Regional Director, National Labor Relations Board. D. C. C. D. Cal. Application for stay pending appeal to the United States Court of Appeals for the Ninth Circuit, presented to Mr. Justice Brennan and Mr. Justice Marshall, and by them referred to the Court, denied.

No. A–849. United States Taxpayer's Union et al. *v.* United States et al. Application for stay of order of the United States District Court for the District of Colorado pending appeal to the United States Court of Appeals for the Tenth Circuit, presented to Mr. Justice White, and by him referred to the Court, denied. Mr. Justice Brennan would grant the application.

No. A–855. Record Data, Inc., et al. *v.* Nichols et al. Application for stay of mandate of the Supreme Court of Alabama, addressed to Mr. Justice White and referred to the Court, denied.

No. A–866. Green *v.* United States et al. Application for a writ of habeas corpus and/or release on personal recognizance, presented to Mr. Justice Blackmun, and by him referred to the Court, denied.

No. 86, Orig. Louisiana *v.* Mississippi et al. Motion for leave to file a bill of complaint granted. The defendants are allowed 60 days in which to answer. Application for stay of proceedings in the United States District Court for the Southern District of Mississippi denied.

No. 79–343. Sun Ship, Inc. *v.* Pennsylvania et al. Pa. Commw. Ct. [Probable jurisdiction noted, 444 U. S. 1011.] Motion of Local No. 6, Industrial Union of Marine & Shipbuilding Workers of America, AFL–CIO, for leave to file a brief as *amicus curiae* granted.

No. 79–509. EXXON CORP. *v.* DEPARTMENT OF REVENUE OF WISCONSIN. Sup. Ct. Wis. [Probable jurisdiction noted, 444 U. S. 961.] Motion of appellant for leave to file a brief after argument granted. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 79–521. CONSUMER PRODUCT SAFETY COMMISSION ET AL. *v.* GTE SYLVANIA, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 444 U. S. 979.] Motion of the Solicitor General to permit Peter Buscemi, Esquire, to present oral argument *pro hac vice* granted.

No. 79–701. ROADWAY EXPRESS, INC. *v.* MONK ET AL. C. A. 5th Cir. [Certiorari granted, 444 U. S. 1012.] Motion of the Solicitor General for divided argument granted. Motion of NAACP Legal Defense and Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted.

No. 79–824. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–825. INSILCO BROADCASTING CORP. ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–826. AMERICAN BROADCASTING COS., INC., ET AL. *v.* WNCN LISTENERS GUILD ET AL; and

No. 79–827. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* WNCN LISTENERS GUILD ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 914.] Motion to dispense with printing appendix granted except as to those portions designated by the Solicitor General who will bear the costs.

No. 79–935. ALLEN ET AL. *v.* MCCURRY. C. A. 8th Cir. [Certiorari granted, 444 U. S. 1070.] Motion of petitioners to dispense with printing appendix granted.

No. 79–938. ALLSTATE INSURANCE CO. *v.* HAGUE. Sup. Ct. Minn. [Certiorari granted, 444 U. S. 1070.] Joint motion to dispense with printing appendix granted.

No. 79–952. THOMAS *v.* REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ET AL. Sup. Ct. Ind. [Certiorari granted, 444 U. S. 1070.] Motion of petitioner to dispense with printing appendix granted.

No. 79–1236. CARSON ET AL. *v.* AMERICAN BRANDS, INC., T/A AMERICAN TOBACCO CO., ET AL. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. A–723 (79–1323). QUINONES *v.* UNITED STATES. Application for stay of mandate of the United States Court of Appeals for the Third Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–793 (79–1434). MANDEL ET AL. *v.* NEW YORK. Ct. App. N. Y. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. 79–5903. H. L. *v.* MATHESON, GOVERNOR OF UTAH, ET AL. Sup. Ct. Utah. [Probable jurisdiction noted, *ante*, p. 903.] Motion to appoint Alan Ernest as counsel for children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 79–1028. MANDEL ET AL. *v.* EN BANC COURT OF APPEALS FOR THE FOURTH CIRCUIT ET AL;

No. 79–1246. CONNOLLY ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (PENSION BENEFIT GUARANTY CORP., REAL PARTY IN INTEREST);

No. 79–6079. MCCLAIN *v.* BLUMENFELD; and

No. 79–6110. GREEN *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI. Motions for leave to file petitions for writs of mandamus denied.

*Probable Jurisdiction Postponed*

No. 79–5962. VINCENT *v.* TEXAS. Appeal from Ct. Crim. App. Tex. Motion of appellant for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 586 S. W. 2d 880.

*Certiorari Granted*

No. 79–621. ARIZONA *v.* MANYPENNY. C. A. 9th Cir. Certiorari granted. Reported below: 608 F. 2d 1197.

No. 79–1128. MONTANA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 604 F. 2d 1162.

No. 79–1013. RUBIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 609 F. 2d 51.

No. 79–5688. HUDSON *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 373 So. 2d 1294.

*Certiorari Denied.* (See also Nos. 79–1152, 79–5837, and 79–6090, *supra.*)

No. 78–6320. PEARSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 67 Ill. App. 3d 300, 384 N. E. 2d 1331.

No. 78–6374. FLETCHER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 2d 868.

No. 79–862. FOSTER *v.* PEARCY. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 387 N. E. 2d 446.

No. 79–885. SHERMAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 42 Md. App. 766.

No. 79–926. PADILLA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 70 Ill. App. 3d 406, 387 N. E. 2d 985.

No. 79–958. O'BRIEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 895.

No. 79–1014. BUCKNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 570.

No. 79–1016. GIACALONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 807.

No. 79–1029. MANDEL ET AL. *v.* UNITED STATES; and
No. 79–1030. RODGERS ET AL. *v.* UNITED STATES C. A. 4th Cir. Certiorari denied. Reported below: 602 F. 2d 653.

No. 79–1040. GILBERT *v.* CLELAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 761.

No. 79–1042. DOLESE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 605 F. 2d 1146.

No. 79–1050. HUDLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 605 F. 2d 488.

No. 79–1051. CITY OF ROHNERT PARK *v.* LANDRIEU, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 1040.

No. 79–1060. ZALMANOWSKI ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 673.

No. 79–1063. KEEFE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 612 F. 2d 570.

No. 79–1100. RIALS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1372.

No. 79–1104. E. I. DU PONT DE NEMOURS & Co. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 221 Ct. Cl. 333, 608 F. 2d 445.

No. 79–1108. JONES ET AL. *v.* MORRISON. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1269.

No. 79–1116. MCINNIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1319.

No. 79–1121. SCOTT *v.* UNITED STATES; and
No. 79–1122. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 347.

No. 79–1138. SCHULZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1103.

No. 79–1146. PETTY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 883.

No. 79–1149. ALLSTATE SAVINGS & LOAN ASSN. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 760.

No. 79–1150. CALIFORNIA, BY AND THROUGH THE DEPARTMENT OF TRANSPORTATION OF CALIFORNIA, ET AL. *v.* DORIA MINING & ENGINEERING CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1255.

No. 79–1161. ST. JOSEPH'S HOSPITAL HEALTH CENTER *v.* BLUE CROSS OF CENTRAL NEW YORK, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1290.

No. 79–1165. SCOTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79–1166. SMITH *v.* WILSON FREIGHT CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 604 F. 2d 712.

No. 79–1168. MCDONALD *v.* GERBERDING ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 92 Wash. 2d 431, 598 P. 2d 707.

No. 79–1196. TIMMONS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1206.

No. 79–1198. SPANNAUS, ATTORNEY GENERAL OF MINNESOTA *v.* GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 608 F. 2d 861.

No. 79–1212. WEINKLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 581.

No. 79–1231. ELY *v.* UNITED PARCEL SERVICE, INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 79–1249. BACKUS *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 79–1255. EARP *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 23 Wash. App. 1071.

No. 79–1261. J. C. ATHANS ENGINEERING & CONSTRUCTION CO., INC. *v.* POWELL ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–1264. HAAS, EXECUTRIX *v.* MANUFACTURERS HANOVER TRUST CO., TRUSTEE. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1287.

No. 79–1265. CATERINA *v.* PENNSYLVANIA. Pa. Commw. Ct. Certiorari denied. Reported below: 43 Pa. Commw. 19, 401 A. 2d 852.

No. 79–1271. POLLEY *v.* KIRKLAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1371.

No. 79–1272. PERRIN, WARDEN, ET AL. *v.* HENRY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 609 F. 2d 1010.

No. 79–1274. DESERT CHRYSLER-PLYMOUTH, INC., ET AL. *v.* CHRYSLER CORP. Sup. Ct. Nev. Certiorari denied. Reported below: 95 Nev. 640, 600 P. 2d 1189.

No. 79–1278. ELLIS ET UX. *v.* ARKANSAS LOUISIANA GAS CO. C. A. 10th Cir. Certiorari denied. Reported below: 609 F. 2d 436.

No. 79–1283. CHICAGO TITLE & TRUST CO., TRUSTEE, ET AL. *v.* TULLY, ASSESSOR OF COOK COUNTY, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 76 Ill. App. 3d 336, 395 N. E. 2d 42.

No. 79–1285. MASCHHOFF *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 373.

No. 79–1286. MORIGEAU *v.* LARRIVEE. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 602 P. 2d 563.

No. 79–1287. STEWART *v.* SUPERIOR COURT OF PIMA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 822.

No. 79–1288. WILT ET AL. *v.* OHIO STATE BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 608 F. 2d 1126.

No. 79–1291. TUCKER *v.* NEAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79–1292. NUNNALLY ET AL. *v.* TRUST COMPANY BANK, CO-TRUSTEE, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 697, 261 S. E. 2d 621.

No. 79–1302. KENNEDY, TRUSTEE IN BANKRUPTCY *v.* HANCOCK INVESTMENT CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 580.

No. 79–1307. DAVIS OIL CO. ET AL. *v.* PARVIN. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 901.

No. 79–1319. POMERANTZ *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 79–1322. ISON *v.* FIRST STATE BANK OF CENTRALIA, ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 1112, 395 N. E. 2d 1249.

No. 79–1324. COSDEN OIL & CHEMICAL CO. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL No. 826. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 585 S. W. 2d 911.

No. 79–1360. SERRANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1145.

No. 79–1363. ASH *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 178.

No. 79–1364. GODE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79–1374. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. 2d Cir. Certiorari before judgment denied.

No. 79–1379. STATEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 578.

No. 79–1381. ESPARZA-CORRAL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 110.

No. 79–1390. WRIGHT, ADMINISTRATRIX *v.* SOUTHERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 156.

No. 79–1405. KAUFMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 1381 and 609 F. 2d 826.

No. 79–1413. JACKSTADT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 617 F. 2d 12.

No. 79–1419. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 453.

No. 79–1430. STRAUBE *v.* EMANUEL LUTHERAN CHARITY BOARD, DBA EMANUEL HOSPITAL. Sup. Ct. Ore. Certiorari denied. Reported below: 287 Ore. 375, 600 P. 2d 381.

No. 79–1431. FREEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 443.

No. 79–5431. TSINNIJINNIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 1035.

No. 79–5805. BERRYMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79–5916. ALEXANDER *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79–5930. BRAY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 79–5935. HERRING *v.* SANDERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 811.

No. 79–5940. TURNER *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 510.

No. 79–5941. MEIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 607 F. 2d 215.

No. 79–5943. NICKERSON ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 79–5964. METHENY *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 589 S. W. 2d 943.

No. 79–5977. COLEMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 586 S. W. 2d 877.

No. 79–6012. GELESTINO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 199 U. S. App. D. C. 95, 617 F. 2d 677.

No. 79–6040. BEEDE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 119 N. H. 620, 406 A. 2d 125.

No. 79–6053. WALKER *v.* UNITED STATES; and
No. 79–6063. MACK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 79–6053, 614 F. 2d 772; No. 79–6063, 614 F. 2d 771.

No. 79–6070. LYNN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79–6085. CAREY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 246, 405 A. 2d 293.

No. 79–6087. TORRES *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 79–6092. LILLIBRIDGE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1360.

No. 79–6097. DUKE *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1001.

No. 79–6098. MCGRUDER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 124 Ariz. 377, 604 P. 2d 641.

No. 79–6105. CANTY *v.* MAHONEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1306.

No. 79–6113. OWENS *v.* MARSHALL, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 581.

No. 79–6114. PRESTIGIACOMO *v.* SMITH, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79–6115. TERRELL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 379 So. 2d 1238.

No. 79–6118. SHERROD *v.* MARYLAND HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1310.

No. 79–6119. HALL *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 288 N. W. 2d 908.

No. 79–6124. LEBRUN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 43 Ore. App. 3, 603 P. 2d 371.

No. 79–6125. COULSTON *v.* HUTTO, CORRECTIONS DIRECTOR. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 810.

No. 79–6126. HAWKINS *v.* CRIST, WARDEN, ET AL. Sup. Ct. Mont. Certiorari denied.

No. 79–6131. JONES *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 214, 393 N. E. 2d 1132.

No. 79–6132. MASON *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 812.

No. 79–6135. CUNNINGHAM *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 220 Ct. Cl. 702, 618 F. 2d 122.

No. 79–6136. WILLIAMS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 79–6140. TRICKER *v.* CUPP, PENITENTIARY SUPERINTENDENT. Sup. Ct. Ore. Certiorari denied.

No. 79–6144. ALLEN *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 1112, 395 N. E. 2d 1250.

No. 79–6162. NORMENT ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 79–6186. NOE *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–6215. MEARS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–6233. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–6252. WRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79–6256. CALLAHAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 443.

No. 79–6259. BURGESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 79–6268. SUHAIL, AKA KIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79–807. PEER, DIRECTOR, DEPARTMENT OF PUBLIC WELFARE OF COUNTY OF SAN DIEGO, ET AL. *v.* GRIFFETH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 118.

MR. JUSTICE REHNQUIST, dissenting.

The Court of Appeals has taken a significant step in this case to expand the ruling of this Court in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), a step that I believe merits plenary consideration by the full Court. The question pertains to whether an *applicant* for state-mandated welfare benefits is entitled to a hearing under the procedural guarantees of the Fourteenth Amendment to the United States Constitution before being denied welfare benefits for failure to meet the initial requirements imposed by state law. The California courts themselves, in *Zobriscky* v. *Los Angeles County*, 28 Cal. App. 3d 930, 105 Cal. Rptr. 121 (1972), have concluded that an applicant is not entitled to any hearing because, in the words of the Court of Appeals for the Ninth Circuit, they "refused to find general relief to be a protected property interest." *Griffeth* v. *Detrich*, 603 F. 2d 118, 121 (1979).

There has been much decisional law from this and other courts, and much scholarly commentary, as to what is a protected "property" interest under the Fourteenth Amendment's Due Process Clause, and what procedural guarantees are necessary under that Clause before one may be denied such a property interest. See, *e. g.*, *Goldberg* v. *Kelly*, *supra*; *Board of Regents* v. *Roth*, 408 U. S. 564 (1972); *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979); Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Administrative State, 62 Cornell L. Rev. 445 (1977). Obviously this Court cannot parse every state-law provision to determine whether it creates a protected "property interest" under the Due Process Clause of the Fourteenth Amendment. But

here I believe the District Court put its finger on the significance of the case when it ruled against respondents, saying:

> "Plaintiffs [respondents] argue that the *pretermination* evidentiary hearing required by the Supreme Court in *Goldberg* v. *Kelly*, 397 U. S. 254 . . . (1970) should be applied to protect *denied* applicants for General Relief in San Diego County. . . . Defendants oppose an *extension* of *Goldberg*'s protection of terminated *recipients* of welfare to denied *applicants* for General Relief. The Supreme Court has not ruled on the issue. *Wheeler* v. *Montgomery*, 397 U. S. 280, 284–285 . . . (1970) (BURGER, C. J., dissenting)." (Emphasis supplied in part.) *Griffeth* v. *Detrich*, 448 F. Supp. 1137, 1139 (SD Cal. 1978).

Particularly when the only state appellate court to consider the question has concluded that there is no protected property interest under state law, this extension of *Goldberg* v. *Kelly*, *supra*, should receive plenary consideration by this Court.

No. 79–1074. UNITED PARCEL SERVICE, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Motion of petitioner to strike brief of intervening respondents and certiorari denied. Reported below: 612 F. 2d 277.

No. 79–1197. NATIONAL LABOR RELATIONS BOARD *v.* MERCY HOSPITAL ASSN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 606 F. 2d 22.

No. 79–5707. FLANAGAN *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to file a supplement to petition granted. Certiorari denied. Reported below: 592 F. 2d 253.

No. 79–5901. WADE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 375 So. 2d 97.

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No. 79–1248. MISSOURI *v.* WANDIX. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 590 S. W. 2d 82.

No. 79–1306. CASTRO *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 612 F. 2d 584.

No. 79–6111. FORD *v.* FLORIDA. Sup. Ct. Fla.;

No. 79–6116. THOMAS *v.* FLORIDA. Sup. Ct. Fla.;

No. 79–6168. STAMPER *v.* VIRGINIA. Sup. Ct. Va.; and

No. 79–6187. TUCKER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79–6111, 374 So. 2d 496; No. 79–6116, 374 So. 2d 508; No. 79–6168, 220 Va. 260, 257 S. E. 2d 808; No. 79–6187, 244 Ga. 721, 261 S. E. 2d 635.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

*Rehearing Denied*

No. 78–1323. NORFOLK & WESTERN RAILWAY CO. *v.* LIEPELT, ADMINISTRATRIX, 444 U. S. 490;

No. 78–1335. VILLAGE OF SCHAUMBURG *v.* CITIZENS FOR A BETTER ENVIRONMENT ET AL., 444 U. S. 620;

No. 78–1871. SNEPP *v.* UNITED STATES, 444 U. S. 507;

No. 79–265. UNITED STATES *v.* SNEPP, 444 U. S. 507;

No. 79–579. ERWIN ET AL. *v.* UNITED STATES, 444 U. S. 1071; and

No. 79–830. VINSON *v.* UNITED STATES, 444 U. S. 1074. Petitions for rehearing denied.

No. 79–833. KONDRAT *v.* CITY OF WILLOUGHBY HILLS ET AL., 444 U. S. 1075;

No. 79–890. LAMERS DAIRY, INC., ET AL. *v.* SECRETARY OF AGRICULTURE, 444 U. S. 1077;

No. 79–894. PARKER *v.* TEXAS, 444 U. S. 1060;

No. 79–918. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL., 444 U. S. 1078;

No. 79–942. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL., 444 U. S. 1078;

No. 79–971. CEFALU *v.* GLOBE NEWSPAPER CO., 444 U. S. 1060;

No. 79–1001. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL., 444 U. S. 1080;

No. 79–5360. MORRIS *v.* CATE-MCLAURIN CO. ET AL., *ante*, p. 917;

No. 79–5733. JONES ET UX. *v.* GEORGIA-PACIFIC CORP., 444 U. S. 1085;

No. 79–5744. ALDERMAN *v.* BALKCOM, WARDEN, 444 U. S. 1103;

No. 79–5777. HAYES *v.* BOARD OF TRUSTEES OF CLARK COUNTY SCHOOL DISTRICT, 444 U. S. 1061;

No. 79–5802. CLARK *v.* PAYNE ET AL., 444 U. S. 1088;

No. 79–5830. BOWDEN *v.* ZANT, WARDEN, 444 U. S. 1103;

No. 79–5872. HARRISON *v.* NAIFEH, JUDGE, ET AL., *ante*, p. 932;

No. 79–5893. YOUNG *v.* INDIANA, *ante*, p. 906;

No. 79–5917. HUNT *v.* GREENBERG, DISTRICT ATTORNEY OF ALBANY COUNTY, ET AL., *ante*, p. 918.

No. 79–5929. TAYLOR *v.* CITY OF ATLANTA ET AL., *ante*, p. 907; and

No. 79–5973. SELLARS *v.* COMMUNITY RELEASE BOARD OF CALIFORNIA, *ante*, p. 919. Petitions for rehearing denied.

No. 78–1548. CALIFORNIA BREWERS ASSN. ET AL. *v.* BRYANT ET AL., 444 U. S. 598. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 79–5986. MAHLER *v.* NELSON, WARDEN, 444 U. S. 1092. Motion for leave to file petition for rehearing denied.

APRIL 17, 1980

*Dismissal Under Rule 60*

No. 79–5974. BROCKINGTON ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari dismissed as to petitioner Brockington under this Court's Rule 60. Reported below: 152 Ga. App. 11, 262 S. E. 2d 170.

# RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

## Effective June 1, 1980

The Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates were prescribed by the Supreme Court of the United States pursuant to 18 U. S. C. § 3402.

These rules, which supersede the rules prescribed by the Court on January 27, 1971 (see 400 U. S. 1037), became effective June 1, 1980, pursuant to the Court's order, *post*, p. 976.

## SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 14, 1980

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## ORDER PRESCRIBING RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

ORDERED that the following Rules to be known as the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates, be and they are hereby prescribed pursuant to § 3402 of Title 18, United States Code. These Rules shall become effective on June 1, 1980, and shall supersede the Rules for the Trial of Minor Offenses before United States Magistrates heretofore promulgated by this Court on January 27, 1971.

## RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

*Rule 1. Scope.*

(*a*) *In general.*—These rules govern the procedure and practice for the conduct of proceedings in misdemeanor cases, including petty offenses, before United States magistrates under 18 U. S. C. § 3401, and for appeals in such cases to judges of the district courts.

(*b*) *Applicability of Federal Rules of Criminal Procedure.*—Except as specifically provided by these rules, the Federal Rules of Criminal Procedure govern all proceedings except those concerning petty offenses for which no sentence of imprisonment will be imposed. Proceedings concerning petty offenses for which no sentence of imprisonment will be imposed are not governed by the Federal Rules of Criminal Procedure, except as specifically provided therein or by these rules. However, to the extent they are not inconsistent with these rules, a magistrate may follow such provisions of the Federal Rules of Criminal Procedure as he deems appropriate.

(*c*) *Definition.*—The term "petty offenses for which no sentence of imprisonment will be imposed," as used in these rules, means any petty offenses, regardless of the penalty authorized by law, as to which the magistrate determines that, in the event of conviction, no sentence of imprisonment will actually be imposed in the particular case.

*Rule 2. Pretrial procedures.*

(*a*) *Trial document.*—The trial of a misdemeanor may proceed on an indictment, information, or complaint or, if it be a petty offense, on a citation or violation notice. The district court, by order or local rule, may make provision for the reference of such cases to a magistrate.

(*b*) *Initial appearance.*—At the defendant's initial appearance on a misdemeanor charge, the magistrate shall inform the defendant of the following:

(1) the charge against him, and the maximum possible penalty provided by law;

(2) his right to retain counsel;

(3) unless he is charged with a petty offense for which appointment of counsel is not required, his right to request the assignment of counsel if he is unable to obtain counsel;

(4) that he is not required to make a statement and that any statement made by him may be used against him;

(5) that he has a right to trial, judgment and sentencing before a judge of the district court;

(6) unless the offense charged is a petty offense, that he has a right to trial by jury before either a magistrate or a judge of the district court;

(7) if the prosecution is not on an indictment or information and is for a misdemeanor other than a petty offense, that he has a right to have a preliminary examination unless he consents to be tried before the magistrate; and

(8) if he is in custody, of the general circumstances under which he may secure pretrial release.

(*c*) *Consent and arraignment.*—If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea to the misdemeanor charge. The defendant may plead not guilty, guilty or, with the consent of the magistrate, *nolo contendere.* If the defendant pleads not guilty, the magistrate shall either conduct the trial within 30 days upon written consent of the defendant or fix a later time for the trial, giving due regard to the needs of the parties to consult with counsel and prepare for trial.

*Rule 3. Additional procedures applicable only to petty offenses for which no sentence of imprisonment will be imposed.*

(*a*) *Failure to consent.*—If the defendant charged with a petty offense for which no sentence of imprisonment will be imposed does not consent to trial before the magistrate, he shall be ordered to appear before a judge of the district court for further proceedings on notice. The file shall be transmitted forthwith to the clerk of the district court.

(*b*) *Plea of guilty or nolo contendere.*—No plea of guilty or *nolo contendere* to a petty offense for which no sentence of imprisonment will be imposed shall be accepted unless the magistrate is satisfied that the defendant understands the nature of the charge and the maximum possible penalty provided by law.

(*c*) *Waiver of venue for plea and sentence.*—A defendant charged with a petty offense for which no sentence of imprisonment will be imposed who is arrested, held, or present in a district other than that in which an indictment, information, complaint, citation or violation notice is pending against him may state in writing that he wishes to plead guilty or *nolo contendere,* to waive venue and trial in the district in which the proceeding against him is pending, and to consent to disposition of the case in the district in which he was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of same shall be given to the magistrate in the district where the proceeding was originally commenced. The defendant's statement that he wishes to plead guilty or *nolo contendere* shall not be used against him.

(*d*) *Sentence.*—If the defendant charged with a petty offense for which no sentence of imprisonment will be imposed pleads guilty or *nolo contendere* or is found guilty after trial, the magistrate shall afford him an opportunity to be heard in mitigation. The magistrate shall then immediately proceed to sentence the defendant, except that in the discretion of the magistrate sentencing may be continued to allow an investi-

gation by the probation service or the submission of additional information by either party.

(*e*) *Notification of right to appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the magistrate shall advise the defendant of his right to appeal.

*Rule 4. Securing defendant's appearance; payment in lieu of appearance.*

(*a*) *Forfeiture of collateral.*—When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable types of misdemeanor cases in lieu of appearance and as authorizing the termination of the proceedings. Such local rules may make provision for increases in such fixed sums not to exceed the maximum fine which could be imposed upon conviction.

(*b*) *Notice to appear.*—If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk of the district court or a magistrate may issue a notice for the defendant to appear before a magistrate on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to his last known address.

(*c*) *Summons or warrant.*—Upon an indictment or a showing by one of the other documents specified in Rule 2 (a) of probable cause to believe that a misdemeanor has been committed and that the defendant has committed it, a magistrate may issue an arrest warrant or, if no warrant is requested by the attorney for the government, a summons. The showing shall be made in writing upon oath or under penalty of perjury, but the affiant need not appear before the magistrate. If the defendant fails to appear before the magistrate in response to a summons, the magistrate may summarily issue a warrant for his immediate arrest and appearance before the magistrate.

*Rule 5. Record.*

Proceedings under these rules shall be taken down by a re-

porter or recorded by suitable sound recording equipment. In the discretion of the magistrate or, in the case of a misdemeanor other than a petty offense, on timely request of either party as provided by local rule, the proceedings shall be taken down by a reporter. With the written consent of the defendant, the keeping of a verbatim record may be waived in petty offense cases.

*Rule 6. New trial.*

The magistrate, on motion of a defendant, may grant a new trial if required in the interest of justice. The magistrate may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the magistrate may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after a finding of guilty or within such further time as the magistrate may fix during the 7-day period.

*Rule 7. Appeal.*

(*a*) *Interlocutory appeal.*—A decision or order by a magistrate which, if made by a judge of the district court, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a judge of the district court provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of the district court a statement specifying the decision or order from which an appeal is taken, and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate.

(*b*) *Appeal from conviction.*—An appeal from a judgment of conviction by a magistrate to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of the district court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon

the United States Attorney, personally or by mail, and by filing a copy with the magistrate.

(*c*) *Record.*—The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly by the magistrate to the clerk of the district court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(*d*) *Stay of execution; release pending appeal.*—The provisions of Rule 38 (a) of the Federal Rules of Criminal Procedure relating to stay of execution shall be applicable to a judgment of conviction entered by a magistrate. The defendant may be released pending appeal by the magistrate or a district judge in accordance with the provisions of law relating to release pending appeal from a judgment of conviction of a district court.

(*e*) *Scope of appeal.*—The defendant shall not be entitled to a trial *de novo* by a judge of the district court. The scope of appeal shall be the same as on an appeal from a judgment of a district court to a court of appeals.

*Rule 8. Local rules.*

Rules adopted by a district court for the conduct of trials before magistrates shall not be inconsistent with these rules. Copies of all rules made by a district court shall, upon their promulgation, be filed with the clerk of the district court and furnished to the Administrative Office of the United States Courts.

# RULES OF THE SUPREME COURT OF THE UNITED STATES

**ADOPTED APRIL 14, 1980**
**EFFECTIVE JUNE 30, 1980**

The following are the Rules of the Supreme Court of the United States as amended on April 14, 1980. See *post*, p. 984. The amended Rules became effective June 30, 1980, as provided in Rule 55, *post*, p. 1047.

For previous revisions of the Rules of the Supreme Court see 346 U. S. 949, 388 U. S. 931, and 398 U. S. 1013.

## ORDER ADOPTING AMENDMENTS TO THE RULES OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 14, 1980

The Rules of this Court as amended on April 14, 1980, have been lodged with the Clerk, and it is ordered that said Rules shall become effective on June 30, 1980, and be printed as an appendix to the United States Reports.

It is further ordered that the Rules promulgated on June 15, 1970, appearing in volume 398 of the United States Reports be, and they hereby are, rescinded, but this shall not affect any proper action taken under them before the Rules hereby adopted become effective.

# RULES OF THE SUPREME COURT OF THE UNITED STATES

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# RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED APRIL 14, 1980—EFFECTIVE JUNE 30, 1980

## PART I. THE COURT

### Rule 1

#### CLERK

.1. The Clerk shall have custody of all the records and papers of the Court and shall not permit any of them to be taken from his custody except as authorized by the Court. After the conclusion of the proceedings in this Court, any original records and papers transmitted as the record on appeal or certiorari will be returned to the court from which they were received. Pleadings, papers, and briefs filed with the Clerk may not be withdrawn by litigants.

.2. The office of the Clerk will be open, except on a federal legal holiday, from 9 a. m. to 5 p. m. Monday through Friday, and from 9 a. m. to noon Saturday.

.3. The Clerk shall not practice as an attorney or counselor while holding his office. See 28 U. S. C. § 955.

### Rule 2

#### LIBRARY

.1. The Bar library will be open to the appropriate personnel of this Court, members of the Bar of this Court, Members of Congress, members of their legal staffs, and attorneys for the United States, its departments and agencies.

.2. The library will be open during such times as the reasonable needs of the Bar require and shall be governed by regulations made by the Librarian with the approval of the Chief Justice or the Court.

.3. Books may not be removed from the building, except by a Justice or a member of his legal staff.

### Rule 3

#### Term

.1. The Court will hold an annual Term commencing on the first Monday in October, and may hold a special term whenever necessary. See 28 U. S. C. § 2.

.2. The Court at every Term will announce the date after which no case will be called for argument at that Term unless otherwise ordered for special cause shown.

.3. At the end of each Term, all cases on the docket will be continued to the next Term.

### Rule 4

#### Sessions, Quorum, and Adjournments

.1. Open sessions of the Court will be held at 10 a. m. on the first Monday in October of each year, and thereafter as announced by the Court. Unless otherwise ordered, the Court will sit to hear arguments from 10 a. m. until noon and from 1 p. m. until 3 p. m.

.2. Any six Members of the Court shall constitute a quorum. See 28 U. S. C. § 1. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending, or if no Justice is present the Clerk or a Deputy Clerk, may announce that the Court will not meet until there is a quorum.

.3. The Court in appropriate circumstances may direct the Clerk or the Marshal to announce recesses and adjournments.

## PART II. ATTORNEYS AND COUNSELORS

### Rule 5

#### Admission to the Bar

.1. It shall be requisite to the admission to practice in this Court that the applicant shall have been admitted to practice

in the highest court of a State, Territory, District, Commonwealth, or Possession for the three years immediately preceding the date of application, and that the applicant appears to the Court to be of good moral and professional character.

.2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other duly authorized official of the proper court evidencing the applicant's admission to practice there and present good standing, and (2) an executed copy of the form approved by the Court and furnished by the Clerk containing (i) the applicant's personal statement and (ii) the statement of two sponsors (who must be members of the Bar of this Court and must personally know, but not be related to, the applicant) endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character.

.3. If the documents submitted by the applicant demonstrate that the applicant possesses the necessary qualifications, the Clerk shall so notify the applicant. Upon the applicant's signing the oath or affirmation and paying the fee required under Rule 45 (e), the Clerk shall issue a certificate of admission. If the applicant desires, however, the applicant may be admitted in open court on oral motion by a member of the Bar, provided that the requirements for admission have been satisfied.

.4. Each applicant shall take or subscribe the following oath or affirmation:

I, ....., do solemnly swear (or affirm) that as an attorney and as a counselor of this Court I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

## Rule 6

### Argument Pro Hac Vice

.1. An attorney admitted to practice in the highest court of a State, Territory, District, Commonwealth, or Possession

who has not been such for three years, but who is otherwise eligible for admission to practice in this Court under Rule 5.1, may be permitted to present oral argument *pro hac vice* in a particular case.

.2. An attorney, barrister, or advocate who is qualified to practice in the courts of a foreign state may be permitted to present oral argument *pro hac vice* in a particular case.

.3. Oral argument *pro hac vice* shall be allowed only on motion of the attorney of record for the party on whose behalf leave is sought. Such motion must briefly and distinctly state the appropriate qualifications of the attorney for whom permission to argue orally is sought; it must be filed with the Clerk, in the form prescribed by Rule 42, no later than the date on which the appellee's or respondent's brief on the merits is due to be filed and it must be accompanied by proof of service as prescribed by Rule 28.

## Rule 7

### Prohibition Against Practice

No one serving as a law clerk or secretary to a Justice of this Court and no other employee of this Court shall practice as an attorney or counselor in any court or before any agency of Government while holding that position; nor shall such person after separating from that position participate, by way of any form of professional consultation or assistance, in any case before this Court until two years have elapsed after such separation; nor shall such person ever participate, by way of any form of professional consultation or assistance, in any case that was pending in this Court during the tenure of such position.

## Rule 8

### Disbarment

Where it is shown to the Court that any member of its Bar has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, such member forthwith

may be suspended from practice before this Court. Such member thereupon will be afforded the opportunity to show good cause, within 40 days, why disbarment should not be effectuated. Upon his response, or upon the expiration of the 40 days if no response is made, the Court will enter an appropriate order.

## PART III. ORIGINAL JURISDICTION

### Rule 9

### Procedure in Original Actions

.1. This Rule applies only to actions within the Court's original jurisdiction under Article III of the Constitution of the United States. Original applications for writs in aid of the Court's appellate jurisdiction are governed by Part VII of these Rules.

.2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this Court.

.3. The initial pleading in any original action shall be prefaced by a motion for leave to file such pleading, and both shall be printed in conformity with Rule 33. A brief in support of the motion for leave to file, which shall comply with Rule 33, may be filed with the motion and pleading. Sixty copies of each document, with proof of service as prescribed by Rule 28, are required, except that, when an adverse party is a State, service shall be made on the Governor and Attorney General of such State.

.4. The case will be placed upon the original docket when the motion for leave to file is filed with the Clerk. The docket fee must be paid at that time, and the appearance of counsel for the plaintiff entered.

.5. Within 60 days after receipt of the motion for leave to file and allied documents, any adverse party may file, with proof of service as prescribed by Rule 28, 60 printed copies

of a brief in opposition to such motion. The brief shall conform to Rule 33. When such brief in opposition has been filed, or when the time within which it may be filed has expired, the motion, pleading, and briefs will be distributed to the Court by the Clerk. The Court may thereafter grant or deny the motion, set it down for argument, or take other appropriate action.

.6. Additional pleadings may be filed, and subsequent proceedings had, as the Court may direct.

.7. A summons issuing out of this Court in any original action shall be served on the defendant 60 days before the return day set out therein; and if the defendant, on such service, shall not respond by the return day, the plaintiff shall be at liberty to proceed *ex parte*.

.8. Any process against a State issued from the Court in an original action shall be served on the Governor and Attorney General of such State.

## PART IV. JURISDICTION ON APPEAL

### Rule 10

APPEAL—HOW TAKEN—PARTIES—CROSS-APPEAL

.1. An appeal to this Court permitted by law shall be taken by filing a notice of appeal in the form, within the time, and at the place prescribed by this Rule, and shall be perfected by docketing the case in this Court as provided in Rule 12.

.2. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the date of its entry, and shall specify the statute or statutes under which the appeal to this Court is taken. A copy of the notice of appeal shall be served on all parties to the proceeding in the court where the judgment appealed from was issued, in the manner prescribed by Rule 28, and proof of service shall be filed with the notice of appeal.

.3. If the appeal is taken from a federal court, the notice of appeal shall be filed with the clerk of that court. If the appeal is taken from a state court, the notice of appeal shall

be filed with the clerk of the court from whose judgment the appeal is taken, and a copy of the notice of appeal shall be filed with the court possessed of the record.

.4. All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court, unless the appellant shall notify the Clerk of this Court in writing of appellant's belief that one or more of the parties below has no interest in the outcome of the appeal. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the Clerk, with service on the other parties, that he has an interest in the appeal. All parties other than appellants shall be appellees, but any appellee who supports the position of an appellant shall meet the time schedule for filing papers which is provided for that appellant, except that any response by such appellee to a jurisdictional statement shall be filed within 20 days after receipt of the statement.

.5. The Court may permit an appellee, without filing a cross-appeal, to defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted.

.6. Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or any one or more of them may appeal separately; or any two or more of them may join in an appeal. Where two or more cases that involve identical or closely related questions are appealed from the same court, it will suffice to file a single jurisdictional statement covering all the issues.

.7. An appellee may take a cross-appeal by perfecting an appeal in the normal manner or, without filing a notice of appeal, by docketing the cross-appeal within the time permitted by Rule 12.4.

## Rule 11

### Appeal, Cross-Appeal—Time for Taking

.1. An appeal to review the judgment of a state court in a criminal case shall be in time when the notice of appeal

prescribed by Rule 10 is filed with the clerk of the court from whose judgment the appeal is taken within 90 days after the entry of such judgment and the case is docketed within the time provided in Rule 12. See 28 U. S. C. § 2101 (d).

.2. An appeal in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 12. See 28 U. S. C. §§ 2101 (a), (b), and (c).

.3. The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

.4. The time for filing a notice of appeal may not be extended.

.5. A cross-appeal shall be in time if it complies with this Rule or if it is docketed as provided in Rule 12.4.

## Rule 12

### Docketing Cases

.1. Not more than 90 days after the entry of the judgment appealed from, it shall be the duty of the appellant to docket the case in the manner set forth in paragraph .3 of this Rule, except that in the case of appeals pursuant to 28 U. S. C. §§ 1252 or 1253, the time limit for docketing shall be 60 days from the filing of the notice of appeal. See 28 U. S. C. § 2101 (a). The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed.

.2. For good cause shown, a Justice of this Court may extend the time for docketing a case for a period not exceeding

60 days. An application for extension of time within which to docket a case must set out the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed, must have appended a copy of the opinion, must specify the date and place of filing of the notice of appeal and append a copy thereof, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42.2, and 43. Such applications are not favored.

.3. Counsel for the appellant shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case then will be placed on the docket. It shall be the duty of counsel for appellant to notify all appellees, on a form supplied by the Clerk, of the date of docketing and of the docket number of the case. Such notice shall be served as required by Rule 28.

.4. Not more than 30 days after receipt of the statement of jurisdiction, counsel for an appellee wishing to cross-appeal shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a printed statement as to jurisdiction on cross-appeal, which shall comply in all respects with Rule 15. The cross-appeal will then be placed on the docket. The issues tendered by a timely cross-appeal docketed under this paragraph may be considered by the Court only in connection with a separate and duly perfected appeal over which this Court has jurisdiction without regard to this paragraph. It shall be the duty of counsel for the cross-appellant to notify the cross-appellee on a form supplied by the Clerk of the date of docketing and of the docket number of the cross-appeal. Such notice shall be served as required by Rule 28. A statement of jurisdiction on cross-appeal may not be joined with any other pleading. The Clerk shall not accept any pleadings so joined. The time for filing a cross-appeal may not be extended.

## Rule 13

### Certification of the Record

.1. An appellant at any time prior to action by this Court on the jurisdictional statement, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not required for the docketing of an appeal. If the appellant has not done so, the appellee may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the appeal may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties. Such requests to certify the record prior to action by the Court on the jurisdictional statement, however, shall not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this Court.

.2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness.

.3. The record may consist of certified copies. But whenever it shall appear necessary or proper, in the opinion of the presiding judge of the court from which the appeal is taken, that original papers of any kind should be inspected in this Court in lieu of copies, the presiding judge may make any rule or order for safekeeping, transporting, and return of the original papers as may seem proper to him. If the record or stipulated portions thereof have been printed for the use of the court below, this printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the Clerk of this Court otherwise requests.

.4. When more than one appeal is taken to this Court from the same judgment, it shall be sufficient to prepare a single

record containing all the matter designated by the parties or the Clerk of this Court, without duplication.

## Rule 14

### Dismissing Appeals

.1. After a notice of appeal has been filed, but before the case has been docketed in this Court, the parties may dismiss the appeal by stipulation filed in the court whose judgment is the subject of the appeal, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 53.

.2. If a notice of appeal has been filed but the case has not been docketed in this Court within the time for docketing, plus any enlargement thereof duly granted, the court whose judgment is the subject of the appeal may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such order thereon with respect to costs as may be just.

.3. If a notice of appeal has been filed but the case has not been docketed in this Court within the time for docketing, plus any enlargement thereof duly granted, and the court whose judgment is the subject of the appeal has denied for any reason an appellee's motion to dismiss the appeal, made as provided in the foregoing paragraph, the appellee may have the cause docketed and may seek to have the appeal dismissed in this Court, by producing a certificate, whether in term or vacation, from the clerk of the court whose judgment is the subject of the appeal, establishing the foregoing facts, and by filing a motion to dismiss, which shall conform to Rule 42 and be accompanied by proof of service as prescribed by Rule 28. The clerk's certificate shall be attached to the motion, but it shall not be necessary for the appellee to file the record. In the event that the appeal is thereafter dismissed, the Court may give judgment for costs against the appellant and in favor of appellee. The appellant shall not be entitled to docket the cause after the appeal shall have been

dismissed under this paragraph, except by special leave of Court.

## Rule 15

### Jurisdictional Statement

.1. The jurisdictional statement required by Rule 12 shall contain, in the order here indicated:

(a) The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all such parties. This listing may be done in a footnote.

(c) A table of contents and table of authorities, if required by Rule 33.5.

(d) A reference to the official and unofficial reports of any opinions delivered in the courts or administrative agency below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked, showing:

(i) The nature of the proceeding and, if the appeal is from a federal court, the statutory basis for federal jurisdiction.

(ii) The date of the entry of the judgment or decree sought to be reviewed, the date of any order respecting a rehearing, the date the notice of appeal was filed, and the court in which it was filed. In the case of a cross-appeal docketed under Rule 12.4, reliance upon that Rule shall be expressly noted, and the date of receipt of the appellant's jurisdictional

statement by the appellee-cross-appellant shall be stated.

(iii) The statutory provision believed to confer jurisdiction of the appeal on this Court, and, if deemed necessary, the cases believed to sustain jurisdiction.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations that the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagraph 1 (j) of this Rule.

(g) A *concise* statement of the case containing the facts material to consideration of the questions presented. The statement of the case shall also specify the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court.

(h) A statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(i) If the appeal is from a decree of a district court granting or denying a preliminary injunction, a showing of the matters in which it is contended that the court has abused its discretion by such action. See *United States* v. *Corrick*, 298 U. S. 435 (1936); *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940).

(j) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of its entry.

(iii) A copy of the judgment or decree appealed from and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree, or order on rehearing.

(iv) A copy of the notice of appeal showing the date it was filed and the name of the court where it was filed.

(v) Any other appended materials.

If what is required by this paragraph to be appended to the statement is voluminous, it may, if more convenient, be separately presented.

.2. The jurisdictional statement shall be produced in conformity with Rule 33. The Clerk shall not accept any jurisdictional statement that does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.3. The jurisdictional statement shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1 (f) of this Rule, and the appendices.

## Rule 16

### Motion to Dismiss or Affirm—Reply—Supplemental Briefs

.1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4,

the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

.2. A motion to dismiss or affirm shall comply in all respects with Rules 33 and 42. Forty copies, with proof of service as prescribed by Rule 28, shall be filed with the Clerk. The Clerk shall not accept a motion or brief that does not comply with this Rule and with Rules 33 and 42, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.3. A motion to dismiss or affirm shall be as short as possible and may not, either separately or cumulatively, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations included in accordance with Rule 34.1 (f), and any appendix.

.4. Upon the filing of such motion, or the expiration of the

time allowed therefor, or express waiver of the right to file, the jurisdictional statement and the motion, if any, will be distributed by the Clerk to the Court for its consideration. However, if a jurisdictional statement on cross-appeal has been docketed under Rule 12.4, distribution of both it and the jurisdictional statement on appeal will be delayed until the filing of a motion to dismiss or affirm by the cross-appellee, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5. A brief opposing a motion to dismiss or affirm may be filed by any appellant, but distribution of the jurisdictional statement and consideration thereof by this Court will not be delayed pending the filing of any such brief. Such brief shall be as short as possible but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.7. After consideration of the papers distributed pursuant to this Rule, the Court will enter an appropriate order. The order may be a summary disposition on the merits. If the order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Clerk forthwith shall notify the court below and counsel of record of the noting or postponement. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court.

.8. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction.

## PART V. JURISDICTION ON WRIT OF CERTIORARI

### Rule 17

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

### Rule 18

CERTIORARI TO A FEDERAL COURT OF APPEALS BEFORE JUDGMENT

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such

court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court. See 28 U. S. C. § 2101 (e); see also, *United States* v. *Bankers Trust Co.*, 294 U. S. 240 (1935); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935); *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110 (1936); *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936); *Ex parte Quirin*, 317 U. S. 1 (1942); *United States* v. *Mine Workers*, 330 U. S. 258 (1947); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *Wilson* v. *Girard*, 354 U. S. 524 (1957); *United States* v. *Nixon*, 418 U. S. 683 (1974).

## Rule 19

### Review on Certiorari—How Sought—Parties

.1. A party intending to file a petition for certiorari, prior to filing the case in this Court or at any time prior to action by this Court on the petition, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the case may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties to the proceeding. Such requests to certify the record prior to action by the Court on the petition for certiorari, however, should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this Court.

.2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. If the record, or stipulated

portions thereof, has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the Clerk of this Court otherwise requests. The provisions of Rule 13.3 with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari.

.3. Counsel for the petitioner shall enter an appearance, pay the docket fee, and file, with proof of service as provided by Rule 28, 40 copies of a petition which shall comply in all respects with Rule 21. The case then will be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the Clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 28.

.4. Parties interested jointly, severally, or otherwise in a judgment may join in a petition for a writ of certiorari therefrom; or any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari to the same court and involve identical or closely related questions, it will suffice to file a single petition for writ of certiorari covering all the cases.

.5. Not more than 30 days after receipt of the petition for certiorari, counsel for a respondent wishing to file a cross-petition that would otherwise be untimely shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a cross-petition for certiorari, which shall comply in all respects with Rule 21. The cross-petition will then be placed on the docket subject, however, to the provisions of Rule 20.5. It shall be the duty of counsel for the cross-petitioner to notify the cross-respondent on a form supplied by the Clerk of the date of docketing and of the docket number of the cross-petition. Such notice shall be served as required by Rule 28. A cross-petition for certiorari may not be joined with any other pleading. The Clerk shall not accept any pleadings so joined. The time for filing a cross-petition may not be extended.

.6. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the Clerk, with service on the other parties, that he has an interest in the petition. All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that any response by such respondent to the petition shall be filed within 20 days after receipt of the petition. The time for filing such response may not be extended.

## Rule 20

### Review on Certiorari—Time for Petitioning

.1. A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

.2. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U. S. C. § 2101 (c).

.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4. The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in

the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

.5. A cross-petition for writ of certiorari shall be deemed in time when it is filed as provided in paragraphs .1, .2, and .4 of this Rule or in Rule 19.5. However, no cross-petition filed untimely except for the provision of Rule 19.5 shall be granted unless a timely petition for writ of certiorari of another party to the case is granted.

.6. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 21.1, subparagraphs (e) and (h)), the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42, and 43. Such applications are not favored.

## Rule 21

### The Petition for Certiorari

.1. The petition for writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all parties. This listing may be done in a footnote.

(c) A table of contents and table of authorities, if required by Rule 33.5.

(d) A reference to the official and unofficial reports of any opinions delivered in the courts or administrative agency below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) Where a cross-petition for writ of certiorari is filed under Rule 19.5, reliance upon that Rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition is filed.

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagraph 1 (k) of this Rule.

(g) A *concise* statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific por-

tions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1 (k) of this Rule.

(i) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17.

(k) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

(iii) A copy of the judgment or decree sought to be reviewed and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree, or order on rehearing.

(iv) Any other appended materials.

If what is required by this paragraph or by subparagraphs 1 (f) and (h) of this Rule, to be included in the petition is voluminous, it may, if more convenient, be separately presented.

.2. The petition for writ of certiorari shall be produced in conformity with Rule 33. The Clerk shall not accept any petition for writ of certiorari that does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph 1 (j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

.4. The petition for writ of certiorari shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1 (f) of this Rule, and the appendix.

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

## Rule 22

### Brief in Opposition—Reply—Supplemental Briefs

.1. Respondent shall have 30 days (unless enlarged by the Court or a Justice thereof or by the Clerk pursuant to Rule 29.4) after receipt of a petition, within which to file 40 printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this Court. See Rule 17. Such brief in opposition shall comply with Rule 33 and with the requirements of Rule 34 governing a respondent's brief, and shall be served as prescribed by Rule 28. The Clerk shall not accept a brief which does not comply with this Rule and with Rule 33, except that a party proceed-

ing *in forma pauperis* may proceed in the manner provided in Rule 46.

.2. A brief in opposition shall be as short as possible and may not, in any single case, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations included in accordance with Rule 34.1 (f), and any appendix.

.3. No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant the writ of certiorari may be included in the brief in opposition.

.4. Upon the filing of a brief in opposition, or the expiration of the time allowed therefor, or express waiver of the right to file, the petition and brief, if any, will be distributed by the Clerk to the Court for its consideration. However, if a cross-petition for certiorari has been filed, distribution of both it and the petition for certiorari will be delayed until the filing of a brief in opposition by the cross-respondent, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5. A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner but distribution under paragraph .4 hereof will not be delayed pending the filing of any such brief. Such brief shall be as short as possible, but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6. Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

## Rule 23

### Disposition of Petition for Certiorari

.1. After consideration of the papers distributed pursuant

to Rule 22, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

.2. Whenever a petition for writ of certiorari to review a decision of any court is granted, an order to that effect shall be entered, and the Clerk forthwith shall notify the court below and counsel of record. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court. A formal writ shall not issue unless specially directed.

.3. Whenever a petition for writ of certiorari to review a decision of any court is denied, an order to that effect will be entered and the Clerk forthwith will notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice thereof.

## PART VI. JURISDICTION OF CERTIFIED QUESTIONS

### Rule 24

#### Questions Certified by a Court of Appeals or by the Court of Claims

.1. When a federal court of appeals or the Court of Claims shall certify to this Court a question or proposition of law concerning which it desires instruction for the proper decision of a cause (see 28 U. S. C. §§ 1254 (3), 1255 (2)), the certificate shall contain a statement of the nature of the cause and the facts on which such question or proposition of law arises. Questions of fact cannot be certified. Only questions or propositions of law may be certified, and they must be distinct and definite.

.2. When a question is certified by a federal court of appeals, and if it appears that there is special reason therefor, this Court, on application or on its own motion, may consider and decide the entire matter in controversy. See 28 U. S. C. § 1254 (3).

### Rule 25

#### Procedure in Certified Cases

.1. When a case is certified, the Clerk will notify the respective parties and shall docket the case. Counsel shall then enter their appearances.

.2. After docketing, the certificate shall be submitted to the Court for a preliminary examination to determine whether the case shall be briefed, set for argument, or the certificate dismissed. No brief may be filed prior to the preliminary examination of the certificate.

.3. If the Court orders that the case be briefed or set down for argument, the parties shall be notified and permitted to file briefs. The Clerk of this Court shall request the clerk of the court from which the case comes to certify the record and transmit it to this Court. Any portion of the record to which the parties wish to direct the Court's particular attention shall be printed in a joint appendix prepared by the appellant or plaintiff in the court below under the procedures provided in Rule 30, but the fact that any part of the record has not been printed shall not prevent the parties or the Court from relying on it.

.4. Briefs on the merits in a case on certificate shall comply with Rules 33, 34, and 35, except that the brief of the party who was appellant or plaintiff below shall be filed within 45 days of the order requiring briefs or setting the case down for argument.

## PART VII. JURISDICTION TO ISSUE EXTRAORDINARY WRITS

### Rule 26

#### Considerations Governing Issuance of Extraordinary Writs

The issuance by the Court of any extraordinary writ authorized by 28 U. S. C. § 1651 (a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will

be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

## Rule 27

### Procedure in Seeking an Extraordinary Writ

.1. The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U. S. C. §§ 1651 (a), 2241, or 2254 (a), shall comply in all respects with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46. The petition shall be captioned "In re (name of petitioner)." All contentions in support of the petition shall be included in the petition. The case will be placed upon the docket when 40 copies, with proof of service as prescribed by Rule 28 (subject to paragraph .3 (b) of this Rule), are filed with the Clerk and the docket fee is paid. The appearance of counsel for the petitioner must be entered at this time. The petition shall be as short as possible, and in any event may not exceed 30 pages.

.2. (a) If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall identify by names and office or function all persons against whom relief is sought and shall set forth with particularity why the relief sought is not available in any other court. There shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition.

(b) The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 21. The petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, within 30 days after receipt of the petition, may file 40 copies of a brief or briefs in opposition thereto, which shall comply fully

with Rules 22.1 and 22.2, including the 30-page limit. If the judge or judges concerned do not desire to respond to the petition, they shall so advise the Clerk and all parties by letter. All persons served pursuant to this paragraph shall be deemed respondents for all purposes in the proceedings in this Court.

.3. (a) If the petition seeks issuance of a writ of habeas corpus, it shall comply with the requirements of 28 U. S. C. § 2242, and in particular with the requirement in the last paragraph thereof that it state the reasons for not making application to the district court of the district in which the petitioner is held. If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted his remedies in the state courts or otherwise comes within the provisions of 28 U. S. C. § 2254 (b). To justify the granting of a writ of habeas corpus, it must be shown that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers and that adequate relief cannot be had in any other form or from any other court. Such writs are rarely granted.

(b) Proceedings under this paragraph .3 will be *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. If a response is ordered, it shall comply fully with Rules 22.1 and 22.2, including the 30-page limit. Neither denial of the petition, without more, nor an order of transfer under authority of 28 U. S. C. § 2241 (b), is an adjudication on the merits, and the former action is to be taken as without prejudice to a further application to any other court for the relief sought.

.4. If the petition seeks issuance of a common-law writ of certiorari under 28 U. S. C. § 1651 (a), there may also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. However, the filing of such record is not required. The petition shall follow, insofar as applicable, the form for a petition for certiorari prescribed by Rule 21, and

shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate process. The respondent, within 30 days after receipt of the petition, may file 40 copies of a brief in opposition, which shall comply fully with Rules 22.1 and 22.2, including the 30-page limit.

.5. When a brief in opposition under paragraphs .2 and .4 has been filed, or when a response under paragraph .3 has been ordered and filed, or when the time within which it may be filed has expired, or upon an express waiver of the right to file, the papers will be distributed to the Court by the Clerk.

.6. If the Court orders the cause set down for argument, the Clerk will notify the parties whether additional briefs are required, when they must be filed, and, if the case involves a petition for common-law certiorari, that the parties shall proceed to print a joint appendix pursuant to Rule 30.

## PART VIII. PRACTICE

### Rule 28

### Filing and Service—Special Rule for Service Where Constitutionality of Act of Congress or State Statute Is in Issue

.1. Pleadings, motions, notices, briefs, or other documents or papers required or permitted to be presented to this Court or to a Justice shall be filed with the Clerk. Any document filed by or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance.

.2. To be timely filed, a document must be received by the Clerk within the time specified for filing, except that any document shall be deemed timely filed if it has been deposited in a United States post office or mailbox, with first-class postage prepaid, and properly addressed to the Clerk of this Court, within the time allowed for filing, and if there is filed with the Clerk a notarized statement by a member of the Bar of this Court, setting forth the details of the mailing, and

stating that to his knowledge the mailing took place on a particular date within the permitted time.

.3. Whenever any pleading, motion, notice, brief, or other document is required by these Rules to be served, such service may be made personally or by mail on each party to the proceeding at or before the time of filing. If the document has been produced under Rule 33, three copies shall be served on each other party separately represented in the proceeding. If the document is typewritten, service of a single copy on each other party separately represented shall suffice. If personal service is made, it may consist of delivery, at the office of counsel of record, to counsel or an employee therein. If service is by mail, it shall consist of depositing the document in a United States post office or mailbox, with first-class postage prepaid, addressed to counsel of record at his post office address. Where a party is not represented by counsel, service shall be upon the party, personally or by mail.

.4. (a) If the United States or any department, office, agency, officer, or employee thereof is a party to be served, service must be made upon the Solicitor General, Department of Justice, Washington, D. C. 20530; and if a response is required or permitted within a prescribed period after service, the time does not begin to run until the document actually has been received by the Solicitor General's office. Where an agency of the United States is authorized by law to appear in its own behalf as a party, or where an officer or employee of the United States is a party, in addition to the United States, such agency, officer, or employee also must be served, in addition to the Solicitor General; and if a response is required or permitted within a prescribed period, the time does not begin to run until the document actually has been received by both the agency, officer, or employee and the Solicitor General's office.

(b) In any proceeding in this Court wherein the constitutionality of an Act of Congress is drawn in question, and the United States or any department, office, agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U. S. C. § 2403 (a)

may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D. C. 20530. In proceedings from any court of the United States, as defined by 28 U. S. C. § 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U. S. C. § 2403 (a), has certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

(c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U. S. C. § 2403 (b) may be applicable and shall be served upon the Attorney General of the State. In proceedings from any court of the United States as defined by 28 U. S. C. § 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U. S. C. § 2403 (b), has certified to the State Attorney General the fact that the constitutionality of such statute of the State was drawn in question.

.5. Whenever proof of service is required by these Rules, it must accompany or be endorsed upon the document in question at the time the document is presented to the Clerk for filing. Proof of service shall be shown by any one of the methods set forth below, and it must contain or be accompanied by a statement that all parties required to be served have been served, together with a list of the names and addresses of those parties; it is not necessary that service on each party required to be served be made in the same manner or evidenced by the same proof:

(a) By an acknowledgment of service of the document in question, signed by counsel of record for the party served.

(b) By a certificate of service of the document in question, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs

of this Rule, and signed by a member of the Bar of this Court representing the party on whose behalf such service has been made. (If counsel certifying to such service has not yet entered an appearance in this Court in respect of the cause in which such service is made, an entry of appearance shall accompany the certificate of service.)

(c) By an affidavit of service of the document in question, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, whenever such service is made by any person not a member of the Bar of this Court.

## Rule 29

### Computation and Enlargement of Time

.1. In computing any period of time prescribed or allowed by these Rules, by order of Court, or by an applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a federal legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a federal legal holiday.

.2. Whenever any Justice of this Court or the Clerk is empowered by law or under any provision of these Rules to extend the time for filing any document or paper, an application seeking such extension must be presented to the Clerk within the period sought to be extended. However, an application for extension of time to docket an appeal or to file a petition for certiorari shall be submitted at least 10 days before the specified final filing date and will not be granted, except in the most extraordinary circumstances, if filed less than 10 days before that date.

.3. An application to extend the time within which a party may docket an appeal or file a petition for a writ of certiorari shall be presented in the form prescribed by Rules 12.2 and 20.6, respectively. An application to extend the time within

which to file any other document or paper may be presented in the form of a letter to the Clerk setting forth with specificity the reasons why the granting of an extension of time is thought justified. Any application seeking an extension of time must be presented and served upon all other parties as provided in Rule 43, and any such application, if once denied, may not be renewed.

.4. Any application for extension of time to file a brief, motion, joint appendix, or other paper, to designate parts of a record for printing in the appendix, or otherwise to comply with a time limit provided by these Rules (except an application for extension of time to docket an appeal, to file a petition for certiorari, to file a petition for rehearing, or to issue a mandate) shall in the first instance be acted upon by the Clerk, whether addressed to him, to the Court, or to a Justice. Any party aggrieved by the Clerk's action on such application may request that it be submitted to a Justice or to the Court. The Clerk's action under this Rule shall be reported by him to the Court in accordance with the instructions that may be issued to him by the Court.

## Rule 30

### The Joint Appendix

.1. Unless the parties agree to use the deferred method allowed in paragraph .4 of this Rule, or the Court so directs, the appellant or petitioner, within 45 days after the order noting or postponing probable jurisdiction or granting the writ of certiorari, shall file 40 copies of a joint appendix, duplicated in the manner prescribed by Rule 33, which shall contain: (1) the relevant docket entries in the courts below; (2) any relevant pleading, jury instruction, finding, conclusion, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the Court's attention. However, any of the foregoing items which have already been reproduced in a jurisdictional statement or the petition for certiorari complying

with Rule 33.1 need not be reproduced again in the joint appendix. The appellant or petitioner shall serve at least three copies of the joint appendix on each of the other parties to the proceeding.

.2. The parties are encouraged to agree to the contents of the joint appendix. In the absence of agreement, the appellant or petitioner, not later than 10 days after the order noting or postponing jurisdiction or granting the writ of certiorari, shall serve on the appellee or respondent a designation of the parts of the record which he intends to include in the joint appendix. If in the judgment of the appellee or respondent the parts of the record so designated are not sufficient, he, within 10 days after receipt of the designation, shall serve upon the appellant or petitioner a designation of additional parts to be included in the joint appendix, and the appellant or petitioner shall include the parts so designated, unless, on his motion in a case where the respondent has been permitted by this Court to proceed *in forma pauperis*, he is excused from supplementing the record.

In making these designations, counsel should include only those materials the Court should examine. Unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices, and counsel may refer in their briefs and oral argument to relevant portions of the record that have not been printed.

.3. At the time that the joint appendix is filed or promptly thereafter, the appellant or petitioner shall file with the Clerk a statement of the costs of preparing the same, and shall serve a copy thereof on each of the other parties to the proceeding. Unless the parties otherwise agree, the cost of producing the joint appendix shall initially be paid by the appellant or petitioner; but if he considers that parts of the record designated by the appellee or respondent are unnecessary for the determination of the issues presented, he may so advise the appellee or respondent who then shall advance the cost of including such parts unless the Court or a Justice otherwise

fixes the initial allocation of the costs. The cost of producing the joint appendix shall be taxed as costs in the case, but if a party shall cause matter to be included in the joint appendix unnecessarily, the Court may impose the cost of producing such matter on that party.

.4. (a) If the parties agree or if the Court shall so order, preparation of the joint appendix may be deferred until after the briefs have been filed, and in that event the appellant or petitioner shall file the joint appendix within 14 days after receipt of the brief of the appellee or respondent. The provisions of paragraphs .1, .2, and .3 of this Rule shall be followed except that the designations referred to therein shall be made by each party at the time his brief is served.

(b) If the deferred method is used, reference in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the joint appendix by placing in brackets the number of each page at the place in the joint appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the joint appendix, he may serve and file typewritten or page-proof copies of his brief within the time required by Rule 35, with appropriate references to the pages of the parts of the record involved. In that event, within 10 days after the joint appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 33 containing references to the pages of the joint appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

.5. At the beginning of the joint appendix there shall be inserted a table of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the joint appendix at which each part begins. The relevant docket entries shall be set out following the table of contents. Thereafter, the other parts of the

record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

.6. Exhibits designated for inclusion in the joint appendix may be contained in a separate volume, or volumes, suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or a court of appeals shall be regarded as an exhibit for the purpose of this paragraph.

.7. The Court by order may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court may require), or on the appendix used in the court below, if it conforms to the requirements of this Rule.

.8. For good cause shown, the time limits specified in this Rule may be shortened or enlarged by the Court, by a Justice thereof, or by the Clerk under the provisions of Rule 29.4.

## Rule 31

### Translations

Whenever any record transmitted to this Court contains any document, paper, testimony, or other proceeding in a foreign language without a translation made under the authority of the lower court or admitted to be correct, the clerk of the court transmitting the record shall report the fact immediately to the Clerk of this Court, to the end that this Court may order that a translation be supplied and, if necessary, printed as a part of the joint appendix.

## Rule 32

### Models, Diagrams, and Exhibits of Material

.1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this Court for its inspection, shall be placed in the custody of the Clerk at least two weeks before the case is heard or submitted.

.2. All such models, diagrams, and exhibits of material placed in the custody of the Clerk must be taken away by the parties within 40 days after the case is decided. When this is not done, it shall be the duty of the Clerk to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

## Rule 33

### Form of Jurisdictional Statements, Petitions, Briefs, Appendices, Motions, and Other Documents Filed with the Court

.1. (a) Except for typewritten filings permitted by Rules 42.2 (c), 43, and 46, all jurisdictional statements, petitions, briefs, appendices, and other documents filed with the Court shall be produced by standard typographic printing, which is preferred, or by any photostatic or similar process which produces a clear, black image on white paper; but ordinary carbon copies may not be used.

(b) The text of documents produced by standard typographic printing shall appear in print as 11-point or larger type with 2-point or more leading between lines. Footnotes shall appear in print as 9-point or larger type with 2-point or more leading between lines. Such documents shall be printed on both sides of the page.

(c) The text of documents produced by a photostatic or similar process shall be done in pica type at no more than 10 characters per inch with the lines double-spaced, except that indented quotations and footnotes may be single-spaced. In

footnotes, elite type at no more than 12 characters per inch may be used. Such documents may be duplicated on both sides of the page, if practicable. They shall not be reduced in duplication.

(d) Whether duplicated under subparagraph (b) or (c) of this paragraph, documents shall be produced on opaque, unglazed paper 6⅛ by 9¼ inches in size, with type matter approximately 4⅛ by 7⅛ inches, and margins of at least ¾ inch on all sides. The paper shall be firmly bound in at least two places along the left margin so as to make an easily opened volume, and no part of the text shall be obscured by the binding. However, appendices in patent cases may be duplicated in such size as is necessary to utilize copies of patent documents.

.2. (a) All documents filed with the Court must bear on the cover, in the following order, from the top of the page: (1) the number of the case or, if there is none, a space for one; (2) the name of this Court; (3) the Term; (4) the caption of the case as appropriate in this Court; (5) the nature of the proceeding and the name of the court from which the action is brought (*e. g.*, On Appeal from the Supreme Court of California; On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit); (6) the title of the paper (*e. g.*, Jurisdictional Statement, Brief for Respondent, Joint Appendix); (7) the name, post office address, and telephone number of the member of the Bar of this Court who is counsel of record for the party concerned, and upon whom service is to be made. The individual names of other members of the Bar of this Court or of the Bar of the highest court in their respective states and, if desired, their post office addresses, may be added, but counsel of record shall be clearly identified. The foregoing shall be displayed in an appropriate typographic manner and, except for the identification of counsel, may not be set in type smaller than 11-point or in upper case pica.

(b) The following documents shall have a suitable cover

consisting of heavy paper in the color indicated: (1) jurisdictional statements and petitions for writs of certiorari, white; (2) motions, briefs, or memoranda filed in response to jurisdictional statements or petitions for certiorari, light orange; (3) briefs on the merits for appellants or petitioners, light blue; (4) briefs on the merits for appellees or respondents, light red; (5) reply briefs, yellow; (6) intervenor or *amicus curiae* briefs (or motions for leave to file, if bound with brief), green; (7) joint appendices, tan; (8) documents filed by the United States, by any department, office, or agency of the United States, or by any officer or employee of the United States, represented by the Solicitor General, gray. All other documents shall have a tan cover. Counsel shall be certain that there is adequate contrast between the printing and the color of the cover.

.3. All documents produced by standard typographic printing or its equivalent shall comply with the page limits prescribed by these Rules. See Rules 15.3; 16.3, 16.5, and 16.6; 21.4; 22.2, 22.5, and 22.6; 27.1, 27.2 (b), 27.3 (b), and 27.4; 34.3 and 34.4; 36.1 and 36.2. Where documents are produced by photostatic or similar process, the following page limits shall apply:

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| Jurisdictional Statement (Rule 15.3) | 65 pages; |
| Motion to Dismiss or Affirm (Rule 16.3) | 65 pages; |
| Brief Opposing Motion to Dismiss or Affirm (Rule 16.5) | 20 pages; |
| Supplemental Brief (Rule 16.6) | 20 pages; |
| Petition for Certiorari (Rule 21.4) | 65 pages; |
| Brief in Opposition (Rule 22.2) | 65 pages; |
| Reply Brief (Rule 22.5) | 20 pages; |
| Supplemental Brief (Rule 22.6) | 20 pages; |
| Petition Seeking Extraordinary Writ (Rule 27.1) | 65 pages; |
| Brief in Opposition (Rule 27.2 (b)) | 65 pages; |
| Response to Petition for Habeas Corpus (Rule 27.3 (b)) | 65 pages; |
| Brief in Opposition (Rule 27.4) | 65 pages; |
| Brief on the Merits (Rule 34.3) | 110 pages; |

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|---|---|
| Reply Brief (Rule 34.4) | 45 pages; |
| Brief of *Amicus Curiae* (Rule 36.2) | 65 pages. |

.4. The Court or a Justice, for good cause shown, may grant leave for the filing of a document in excess of the page limits, but such an application is not favored. An application for such leave shall comply in all respects with Rule 43; and it must be submitted at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

.5. (a) All documents filed with the Court which exceed five pages, regardless of method of duplication (other than joint appendices, which in this respect are governed by Rule 30), shall be preceded by a table of contents, unless the document contains only one item.

(b) All documents which exceed three pages, regardless of method of duplication, shall contain, following the table of contents, a table of authorities (*i. e.*, cases (alphabetically arranged), constitutional provisions, statutes, textbooks, etc.) with correct references to the pages where they are cited.

.6. The body of all documents at their close shall bear the name of counsel of record and such other counsel identified on the cover of the document in conformity with Rule 33.2 (a) as may be desired. One copy of every motion and application (other than one to dismiss or affirm under Rule 16) in addition must bear at its close the manuscript signature of counsel of record.

.7. The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument.

## Rule 34

### Briefs on the Merits—In General

.1. A brief of an appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order here indicated:

(a) The questions presented for review, stated as required by Rule 15.1 (a) or Rule 21.1 (a), as the case may be. The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all such parties. This listing may be done in a footnote.

(c) The table of contents and table of authorities, as required by Rule 33.5.

(d) Citations to the opinions and judgments delivered in the courts below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text, if not already set forth in the jurisdictional statement or petition for certiorari, shall be set forth in an appendix to the brief.

(g) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the Joint Appendix, *e. g.* (J. A. 12) or to the record, *e. g.* (R. 12).

(h) A summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

(i) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon.

(j) A conclusion, specifying with particularity the relief to which the party believes himself entitled.

.2. The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement by the other side, and except that items (a), (b), (d), (e), and (f) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side.

.3. A brief on the merits shall be as short as possible, but, in any event, shall not exceed 50 pages in length.

.4. A reply brief shall conform to such portions of the Rule as are applicable to the brief of an appellee or respondent, but need not contain a summary of argument, if appropriately divided by topical headings. A reply brief shall not exceed 20 pages in length.

.5. Whenever, in the brief of any party, a reference is made to the Joint Appendix or the record, it must be accompanied by the appropriate page number. If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge must be indicated, *e. g.* (Pl. Ex. 14; R. 199, 2134).

.6. Briefs must be compact, logically arranged with proper

headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court.

## Rule 35

### Briefs on the Merits—Time for Filing

.1. Counsel for the appellant or petitioner shall file with the Clerk 40 copies of the printed brief on the merits within 45 days of the order noting or postponing probable jurisdiction, or of the order granting the writ of certiorari.

.2. Forty printed copies of the brief of the appellee or respondent shall be filed with the Clerk within 30 days after the receipt by him of the brief filed by the appellant or petitioner.

.3. A reply brief will be received no later than one week before the date of oral argument, and only by leave of Court thereafter.

.4. The periods of time stated in paragraphs .1 and .2 of this Rule may be enlarged as provided in Rule 29, upon application duly made; or, if a case is advanced for hearing, the time for filing briefs may be abridged as circumstances require, pursuant to order of the Court on its own or a party's application.

.5. Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, he may file 40 printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these Rules, up to the time the case is called for hearing, or, by leave of Court, thereafter.

.6. No brief will be received through the Clerk or otherwise after a case has been argued or submitted, except from a party and upon leave of the Court.

.7. No brief will be received by the Clerk unless the same shall be accompanied by proof of service as required by Rule 28.

## Rule 36

### Brief of an Amicus Curiae

.1. A brief of an *amicus curiae* prior to consideration of the jurisdictional statement or of the petition for writ of certiorari, accompanied by written consent of the parties, may be filed only if submitted within the time allowed for the filing of the motion to dismiss or affirm or the brief in opposition to the petition for certiorari. A motion for leave to file such a brief when consent has been refused is not favored. Any such motion must be filed within the time allowed for filing of the brief and must be accompanied by the proposed brief. In any event, no such brief shall exceed 20 pages in length.

.2. A brief of an *amicus curiae* in a case before the Court for oral argument may be filed when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported and if in support of neither party, within the time allowed for filing appellant's or petitioner's brief. Any such brief must identify the party supported, shall be as concise as possible, and in no event shall exceed 30 pages in length. No reply brief of an *amicus curiae* will be received.

.3. When consent to the filing of a brief of an *amicus curiae* in a case before the Court for oral argument is refused by a party to the case, a motion for leave to file, accompanied by the proposed brief, complying with the 30-page limit, may be presented to the Court. No such motion shall be received unless submitted within the time allowed for the filing of an *amicus* brief on written consent. The motion shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

.4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States

sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its attorney general; or for a political subdivision of a State, Territory, or Commonwealth sponsored by the authorized law officer thereof.

.5. All briefs, motions, and responses filed under this Rule shall comply with the applicable provisions of Rules 33, 34, and 42 (except that it shall be sufficient to set forth the interest of the *amicus curiae*, the argument, the summary of argument, and the conclusion); and shall be accompanied by proof of service as required by Rule 28.

## Rule 37

### Call and Order of the Calendar

.1. The Clerk, at the commencement of each Term, and periodically thereafter, shall prepare a calendar consisting of cases available for argument. Cases will be calendared so that they will not normally be called for argument less than two weeks after the brief of the appellee or respondent is due. The Clerk shall keep the calendar current throughout the Term, adding cases as they are set down for argument, and making rearrangements as required.

.2. Unless otherwise ordered, the Court, on the first Monday of each Term, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the Term in the same order, except that the arrangement of cases on the calendar shall be subject to modification in the light of the availability of appendices, extensions of time to file briefs, orders advancing, postponing or specially setting arguments, and other relevant factors. The Clerk will advise counsel seasonably when they are required to be present in the Court. He shall periodically publish hearing lists in advance of each argument session, for the convenience of counsel and the information of the public.

.3. On the Court's own motion, or on motion of one or more

parties, the Court may order that two or more cases, involving what appear to be the same or related questions, be argued together as one case, or on such terms as may be prescribed.

## Rule 38

### Oral Argument

.1. Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed. Counsel should assume that all Members of the Court have read the briefs in advance of argument. *The Court looks with disfavor on any oral argument that is read from a prepared text.* The Court is also reluctant to accept the submission of briefs, without oral argument, of any case in which jurisdiction has been noted or postponed to the merits or certiorari has been granted. Notwithstanding any such submission, the Court may require oral argument by the parties.

.2. The appellant or petitioner is entitled to open and conclude the argument. When there is a cross-appeal or a cross-writ of certiorari it shall be argued with the initial appeal or writ as one case and in the time of one case, and the Court will advise the parties which one is to open and close.

.3. Unless otherwise directed, one-half hour on each side is allowed for argument. Counsel is not required to use all the allotted time. Any request for additional time shall be presented by motion to the Court filed under Rule 42 not later than 15 days after service of appellant's or petitioner's brief on the merits, and shall set forth with specificity and conciseness why the case cannot be presented within the half-hour limitation.

.4. Only one counsel will be heard for each side, except by special permission granted upon a request presented not later than 15 days after service of the petitioner's or appellant's brief on the merits. Such request shall be by a motion to the Court under Rule 42, and shall set forth with specificity and conciseness why more than one counsel should be heard. Divided arguments are not favored.

.5. In any case, and regardless of the number of counsel

participating, counsel having the opening will present his case fairly and completely and not reserve points of substance for rebuttal.

.6. Oral argument will not be heard on behalf of any party for whom no brief has been filed.

.7. By leave of Court, and subject to paragraph .4 of this Rule, counsel for an *amicus curiae* whose brief has been duly filed pursuant to Rule 36 may, with the consent of a party, argue orally on the side of such party. In the absence of such consent, argument by counsel for an *amicus curiae* may be made only by leave of Court, on motion particularly setting forth why such argument is thought to provide assistance to the Court not otherwise available. Any such motion will be granted only in the most extraordinary circumstances.

## Rule 39

### Form of Typewritten Papers

.1. All papers specifically permitted by these Rules to be presented to the Court without being printed shall, subject to Rule 46.3, be typewritten or otherwise duplicated upon opaque, unglazed paper, 8½ by 13 inches in size (legal cap), and shall be stapled or bound at the upper left-hand corner. The typed matter, except quotations, must be double-spaced. All copies presented to the Court must be legible.

.2. The original of any such motion or application, except a motion to dismiss or affirm, must be signed in manuscript by the party or by counsel of record.

## Rule 40

### Death, Substitution, and Revivor—Public Officers, Substitution and Description

.1. Whenever any party shall die after filing a notice of appeal to this Court or a petition for writ of certiorari, the proper representative of the deceased may appear and, upon motion, may be substituted in an appropriate case as a party to the proceeding. If such representative shall not volun-

tarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for such an order, if appellee or respondent, shall be entitled to have the appeal or petition for writ of certiorari dismissed or the judgment vacated for mootness, as may be appropriate. The party so moving, if an appellant or petitioner, shall be entitled to proceed as in other cases of non-appearance by appellee or respondent. Such substitution, or, in default thereof, such suggestion, must be made within six months after the death of the party, or the case shall abate.

.2. Whenever, in the case of a suggestion made as provided in paragraph .1 of this Rule, the case cannot be revived in the court whose judgment is sought to be reviewed because the deceased party has no proper representative within the jurisdiction of that court, but does have a proper representative elsewhere, proceedings then shall be had as this Court may direct.

.3. When a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

.4. When a public officer is a party in a proceeding here in his official capacity, he may be described as a party by his official title rather than by name; but the Court may require his name to be added.

## Rule 41

### Custody of Prisoners in Habeas Corpus Proceedings

.1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to

another unless such transfer is directed in accordance with the provisions of this Rule. Upon application of a custodian showing a need therefor, the court, Justice, or judge rendering the decision under review may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

.2. Pending such review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court, Justice, or judge rendering the decision, or to the court of appeals or to this Court or to a judge or Justice of either court.

.3. Pending such review of a decision ordering release, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court, Justice, or judge rendering the decision, or the court of appeals or this Court, or a judge or Justice of either court, shall otherwise order.

.4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall govern review in the court of appeals and in this Court unless for reasons shown to the court of appeals or to this Court, or to a judge or Justice of either court, the order shall be modified or an independent order respecting custody, enlargement, or surety shall be made.

## Rule 42

### Motions to the Court

.1. Every motion to the Court shall state clearly its object, the facts on which it is based, and (except for motions under Rule 27) may present legal argument in support thereof. No separate briefs may be filed. All motions shall be as short as possible, and shall comply with any other applicable page limit. For an application or motion addressed to a single Justice, see Rule 43.

.2. (a) A motion in any action within the Court's original jurisdiction shall comply with Rule 9.3.

(b) A motion to dismiss or affirm made under Rule 16, a motion to dismiss as moot (or a suggestion of mootness), a motion for permission to file a brief *amicus curiae*, any motion the granting of which would be dispositive of the entire case or would affect the final judgment to be entered (other than a motion to docket or dismiss under Rule 14, or a motion for voluntary dismissal under Rule 53), and any motion to the Court longer than five pages, shall be duplicated as provided in Rule 33, and shall comply with all other requirements of that Rule. Forty copies of the motion shall be filed.

(c) Any other motion to the Court may be typewritten in accordance with Rule 39, but the Court may subsequently require any such motion to be duplicated by the moving party in the manner provided by Rule 33.

.3. A motion to the Court shall be filed with the Clerk, with proof of service as provided by Rule 28, unless *ex parte* in nature. No motion shall be presented in open court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argument will not be heard on any motion unless the Court so directs.

.4. A response to a motion shall be made as promptly as possible considering the nature of the relief asked and any asserted need for emergency action, and, in any event, shall be made within 10 days of receipt, unless otherwise ordered by the Court or a Justice, or by the Clerk under the provisions of Rule 29.4. A response to a printed motion shall be printed if time permits. However, in appropriate cases, the Court in its discretion may act on a motion without waiting for a response.

## Rule 43

### Motions and Applications to Individual Justices

.1. Any motion or application addressed to an individual Justice shall normally be submitted to the Clerk, who will promptly transmit it to the Justice concerned. If oral argument on the application is deemed imperative, request therefor shall be included in the application.

.2. Any motion or application addressed to an individual

Justice shall be filed in the form prescribed by Rule 39, and shall be accompanied by proof of service on all other parties.

.3. The Clerk in due course will advise all counsel concerned, by means as speedy as may be appropriate, of the time and place of the hearing, if any, and of the disposition made of the motion or application.

.4. The motion or application will be addressed to the Justice allotted to the Circuit within which the case arises. When the Circuit Justice is unavailable, for any reason, a motion or application addressed to that Justice shall be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

.5. A Justice denying a motion or application made to him will note his denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is out of time under Rule 29.3, the party making the motion or application, except in the case of an application for extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except where the denial has been without prejudice, any such renewed motion or application is not favored.

.6. Any Justice to whom a motion or application for a stay or for bail is submitted may refer it to the Court for determination.

## Rule 44

### Stays

.1. A stay may be granted by a Justice of this Court as permitted by law; and a writ of injunction may be granted by any Justice in a case where it might be granted by the Court.

.2. Whenever a party desires a stay pending review in this Court, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court when action by that court is required by law, or to a Justice of this Court, a motion to stay the enforcement of the judgment of which review is sought. If the stay is to act as a supersedeas, a supersedeas bond shall accompany the motion and shall have such surety or sureties as said judge, court, or Justice may

require. The bond shall be conditioned on satisfaction of the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and on full satisfaction of any modified judgment and such costs, interest, and damages as this Court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs, interest, and damages for delay, unless the judge, court, or Justice, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy, as in a real action, replevin, or an action to foreclose a mortgage, or when the property is in the custody of the court, or when the proceeds of such property or a bond for its value is in the custody or control of any court wherein the proceeding appealed from was had, the amount of the bond shall be fixed at such sum as will secure only the amount recovered for the use and detention of the property, costs, interest, and damages for delay.

.3. A petitioner entitled thereto may present to a Justice of this Court an application to stay the enforcement of the judgment sought to be reviewed on certiorari. 28 U. S. C. § 2101 (f).

.4. An application for a stay or injunction to a Justice of this Court shall not be entertained, except in the most extraordinary circumstances, unless application for the relief sought first has been made to the appropriate court or courts below, or to a judge or judges thereof. Any application must identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and must set forth with specificity the reasons why the granting of a stay or injunction is deemed justified. Any such application is governed by Rule 43.

.5. If an application for a stay addressed to the Court is

received in vacation, the Clerk will refer it pursuant to Rule 43.4.

### Rule 45

#### Fees

In pursuance of 28 U. S. C. § 1911, the fees to be charged by the Clerk are fixed as follows:

(a) For docketing a case on appeal (except a motion to docket and dismiss under Rule 14.3, wherein the fee is $50) or on petition for writ of certiorari, or docketing any other proceeding, except cases involving certified questions, $200, to be increased to $300 in a case on appeal, or writ of certiorari, or in other circumstances when oral argument is permitted.

(b) For filing a petition for rehearing, $50.

(c) For a photographic reproduction and certification of any record or paper, $1 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, 5 cents per page.

(d) For a certificate and seal, $10.

(e) For admission to the Bar and certificate under seal, $100.

(f) For a duplicate certificate of an admission to the Bar under seal, $10.

## PART IX. SPECIAL PROCEEDINGS

### Rule 46

#### Proceedings In Forma Pauperis

.1. A party desiring to proceed in this Court *in forma pauperis* shall file a motion for leave so to proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc., Form 4 (as adapted, if the party is seeking a writ of certiorari), setting forth with particularity facts showing that he comes within the statutory requirements. See 28 U. S. C. § 1915. However, the affidavit need not state the issues to be presented, and if the district court or the court of appeals has

appointed counsel under the Criminal Justice Act of 1964, as amended, the party need not file an affidavit. See 18 U. S. C. § 3006A (d)(6). The motion shall also state whether or not leave to proceed *in forma pauperis* was sought in any court below and, if so, whether leave was granted.

.2. With the motion, and affidavit if required, there shall be filed the appropriate substantive document—jurisdictional statement, petition for writ of certiorari, or motion for leave to file, as the case may be—which shall comply in every respect with the Rules governing the same, except that it shall be sufficient to file a single copy thereof.

.3. All papers and documents presented under this Rule shall be clearly legible and should, whenever possible, comply with Rule 39. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will refuse to receive any document sought to be filed that does not comply with the substance of these Rules, or when it appears that the document is obviously and jurisdictionally out of time.

.4. When the papers required by paragraphs .1 and .2 of this Rule are presented to the Clerk, accompanied by proof of service as prescribed by Rule 28, he, without payment of any docket or other fees, will file them, and place the case on the docket.

.5. The appellee or respondent in a case *in forma pauperis* may respond in the same manner and within the same time as in any other case of the same nature, except that the filing of a single response, typewritten or otherwise duplicated, with proof of service as required by Rule 28, will suffice whenever petitioner or appellant has filed typewritten papers. The appellee or respondent, in such response or in a separate document filed earlier, may challenge the grounds for the motion to proceed *in forma pauperis*.

.6. Whenever the Court appoints a member of the Bar to serve as counsel for an indigent party in a case set for oral argument, the briefs prepared by such counsel, unless he requests otherwise, will be printed under the supervision of

the Clerk. The Clerk also will reimburse such counsel for necessary travel expenses to Washington, D. C., and return, in connection with the argument.

.7. Where this Court has granted certiorari or noted or postponed probable jurisdiction in a federal case involving the validity of a federal or state criminal judgment, and where the defendant in the original criminal proceeding is financially unable to obtain adequate representation or to meet the necessary expenses in this Court, the Court will appoint counsel who may be compensated, and whose necessary expenses may be repaid, to the extent provided by the Criminal Justice Act of 1964, as amended (18 U. S. C. § 3006A).

### Rule 47

#### Veterans' and Seamen's Cases

.1. A veteran suing to establish reemployment rights under 38 U. S. C. § 2022, or under similar provisions of law exempting veterans from the payment of fees or court costs, may proceed upon typewritten papers as under Rule 46, except that the motion shall ask leave to proceed as a veteran, and the affidavit shall set forth the moving party's status as a veteran.

.2. A seaman suing pursuant to 28 U. S. C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor, but he is not relieved of printing costs nor entitled to proceed on typewritten papers except by separate motion, or unless, by motion and affidavit, he brings himself within Rule 46.

## PART X. DISPOSITION OF CASES

### Rule 48

#### Opinions of the Court

.1. All opinions of the Court shall be handed to the Clerk immediately upon delivery thereof. He shall deliver copies to the Reporter of Decisions and shall cause the opinions to be issued in slip form. The opinions shall be filed by the Clerk for preservation.

.2. The Reporter of Decisions shall prepare the opinions for publication in preliminary prints and bound volumes of the United States Reports.

## Rule 49

### Interest and Damages

.1. Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment below was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate shall contain instructions with respect to allowance of interest. Interest will be allowed at the same rate that similar judgments bear interest in the courts of the State where the judgment was entered or was directed to be entered.

.2. When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

## Rule 50

### Costs

.1. In a case of affirmance of any judgment or decree by this Court, costs shall be paid by appellant or petitioner, unless otherwise ordered by the Court.

.2. In a case of reversal or vacating of any judgment or decree by this Court, costs shall be allowed to appellant or petitioner, unless otherwise ordered by the Court.

.3. The fees of the Clerk and the costs of serving process and printing the joint appendix in this Court are taxable items. The costs of the transcript of record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.

.4. In a case where a question has been certified, including a case where the certificate is dismissed, costs shall be equally divided unless otherwise ordered by the Court; but where a decision is rendered on the whole matter in controversy (see Rule 24.2), costs shall be allowed as provided in paragraphs .1 and .2 of this Rule.

.5. In a civil action commenced on or after July 18, 1966, costs under this Rule shall be allowed for or against the United States, or an officer or agent thereof, unless expressly waived or otherwise ordered by the Court. See 28 U. S. C. § 2412. In any other civil action, no such costs shall be allowed, except where specifically authorized by statute and directed by the Court.

.6. When costs are allowed in this Court, it shall be the duty of the Clerk to insert the amount thereof in the body of the mandate or other proper process sent to the court below, and annex to the same the bill of items taxed in detail. The prevailing side in such a case is not to submit to the Clerk any bill of costs.

.7. In an appropriate instance, the Court may adjudge double costs.

## Rule 51

### Rehearings

.1. A petition for rehearing of any judgment or decision other than one on a petition for writ of certiorari, shall be filed within 25 days after the judgment or decision, unless the time is shortened or enlarged by the Court or a Justice. Forty copies, produced in conformity with Rule 33, must be filed (except where the party is proceeding *in forma pauperis* under Rule 46), accompanied by proof of service as prescribed by Rule 28. Such petition must briefly and distinctly state its grounds. Counsel must certify that the petition is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel. A petition for rehearing is not subject to oral argument, and will not be granted except at the instance of a Justice who concurred in the judgment or decision and with the concurrence of a majority of the Court. See also Rule 52.2.

.2. A petition for rehearing of an order denying a petition for writ of certiorari shall comply with all the form and filing requirements of paragraph .1, but its grounds must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.

Counsel must certify that the petition is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel or of the party when not represented by counsel. A petition for rehearing without such certificate shall be rejected by the Clerk. Such petition is not subject to oral argument.

.3. No response to a petition for rehearing will be received unless requested by the Court, but no petition will be granted without an opportunity to submit a response.

.4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this Rule, will not be received.

## Rule 52

### Process; Mandates

.1. All process of this Court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

.2. In a case coming from a state court, mandate shall issue as of course after the expiration of 25 days from the day the judgment is entered, unless the time is shortened or enlarged by the Court or a Justice, or unless the parties stipulate that it be issued sooner. The filing of a petition for rehearing, unless otherwise ordered, will stay the mandate until disposition of such petition, and if the petition is then denied, the mandate shall issue forthwith. When, however, a petition for rehearing is not acted upon prior to adjournment, or is filed after the Court adjourns, the judgment or mandate of the Court will not be stayed unless specifically ordered by the Court or a Justice.

.3. In a case coming from a federal court, a formal mandate will not issue, unless specially directed; instead, the Clerk will send the proper court a copy of the opinion or order of the Court and a certified copy of the judgment (which shall include provisions for the recovery of costs, if any are awarded). In all other respects, the provisions of paragraph .2 apply.

## Rule 53

### Dismissing Causes

.1. Whenever the parties thereto, at any stage of the proceedings, file with the Clerk an agreement in writing that any cause be dismissed, specifying the terms with respect to costs, and pay to the Clerk any fees that may be due, the Clerk, without further reference to the Court, shall enter an order of dismissal.

.2. (a) Whenever an appellant or petitioner in this Court files with the Clerk a motion to dismiss a cause to which he is a party, with proof of service as prescribed by Rule 28, and tenders to the Clerk any fees and costs that may be due, the adverse party, within 15 days after service thereof, may file an objection, limited to the quantum of damages and costs in this Court alleged to be payable, or, in a proper case, to a showing that the moving party does not represent all appellants or petitioners if there are more than one. The Clerk will refuse to receive any objection not so limited.

(b) Where the objection goes to the standing of the moving party to represent the entire side, the party moving for dismissal, within 10 days thereafter, may file a reply, after which time the matter shall be laid before the Court for its determination.

(c) If no objection is filed, or if upon objection going only to the quantum of damages and costs in this Court, the party moving for dismissal, within 10 days thereafter, shall tender the whole of such additional damages and costs demanded, the Clerk, without further reference to the Court, shall enter an order of dismissal. If, after objection as to quantum of damages and costs in this Court, the moving party does not respond with such a tender within 10 days, the Clerk shall report the matter to the Court for its determination.

.3. No mandate or other process shall issue on a dismissal under this Rule without an order of the Court.

## PART XI. APPLICATION OF TERMS

### Rule 54

#### Term "State Court"

The term "state court" when used in these Rules normally includes the District of Columbia Court of Appeals and the Supreme Court of the Commonwealth of Puerto Rico (see 28 U. S. C. §§ 1257, 1258), and references in these Rules to the law and statutes of a State normally include the law and statutes of the District of Columbia and of the Commonwealth of Puerto Rico.

### Rule 55

#### Effective Date of Amendments

The amendments to these Rules adopted April 14, 1980, shall become effective June 30, 1980.

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**Reporter's Note**

The next page is purposely numbered 1301. The numbers between 1064 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

## OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

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## CALIFORNIA *v.* VELASQUEZ

ON APPLICATION FOR STAY

No. A-773. Decided March 24, 1980

California's application for a stay, pending review by certiorari, of enforcement of the California Supreme Court's judgment reversing the imposition of a death sentence but upholding respondent's conviction, is granted.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant seeks a stay of the enforcement of the judgment of the Supreme Court of California in *People* v. *Velasquez*, 26 Cal. 3d 425, 606 P. 2d 341 (1980), pending the filing of a petition for certiorari and its disposition by this Court. Applicant contends that the Supreme Court of California has reversed the imposition of a sentence of death, although upholding the conviction, because the trial was conducted in violation of this Court's decision in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968).

This Court has granted certiorari in *Adams* v. *Texas*, No. 79–5175, 444 U. S. 990, and that case is presently set for argument today. The issues presented there are sufficiently related to the issues which the applicant State says it will raise in its petition for certiorari in this case that I have decided to grant the State's application for stay pending (1) consideration and decision of *Adams* v. *Texas*, *supra*, by this Court, and (2) the filing and disposition of a timely petition for certiorari in this case by the applicant.

I am not persuaded by the response that the decision below rests upon a reading of state law by the Supreme Court of

California. Neither *In re Anderson*, 69 Cal. 2d 613, 447 P. 2d 117 (1968), which was cited by the court below, nor *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), which was not, supports respondent's position. *Anderson*, as I read it, was based primarily upon this Court's decision in *Witherspoon*. *Wheeler*, while itself based on state law, seems clearly distinguishable from the present case.

The application for stay is accordingly granted.

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**RECLAMATION OF DESERT LANDS.** See **Carey Act of 1894.**

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**REFUSAL TO COOPERATE WITH GOVERNMENT OFFICIALS.** See **Constitutional Law, VII, 2.**

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**RESIDENTIAL ARRESTS.** See **Constitutional Law**, VI, 1.

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**RIGHT TO COUNSEL.** See **Constitutional Law**, III, 2; **Omnibus Crime Control and Safe Streets Act of 1968.**

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**SECRETARY OF THE INTERIOR.** See **Carey Act of 1894.**

**SECURITIES AND EXCHANGE COMMISSION.** See **Securities Exchange Act of 1934.**

**SECURITIES EXCHANGE ACT OF 1934.**

*Fraud—Corporate takeover bids—Conduct of financial printer's employee.*—Employee of a financial printer that had been engaged by certain corporations to print corporate takeover bids was improperly convicted under antifraud provisions of § 10 (b) of Act and implementing Securities and Exchange Commission Rule 10b–5 on theory that he violated duty of disclosure to sellers of target companies' stock when, after deducing names of target companies from information supplied to printer, he bought stock in target companies without disclosing his knowledge to sellers and then sold stock immediately after takeover attempts were made public. Chiarella v. United States, p. 222.

**SELF-INCRIMINATION.** See **Constitutional Law**, VII.

**SENTENCES.** See also **Constitutional Law**, II; VII, 2.

*District of Columbia Code—Rape and killing during course thereof—Consecutive sentences.*—Under District of Columbia Code, consecutive sentences may not be imposed for rape and for killing victim in course of such rape, since under Code each offense does not require proof of a fact which other does not, all elements of offense of rape being included in offense of killing in course of a rape. Whalen v. United States, p. 684.

**SEWAGE TREATMENT PLANTS.** See **Federal Water Pollution Control Act**, 2.

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*Death sentence—State-court judgment.*—California's application for a stay, pending certiorari, of enforcement of California Supreme Court's judgment reversing imposition of a death sentence but upholding conviction, is granted. California v. Velasquez (REHNQUIST, J., in chambers), p. 1301.

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**SUPREME COURT.**

1. Notation of the death of Mr. Justice Reed (retired), p. v.
2. Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates, p. 975.
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**TUCKER ACT.** See **Indians, 1.**

**TWENTY-FIRST AMENDMENT.** See **Antitrust Acts.**

**UNCOUNSELED FELONY CONVICTIONS.** See **Omnibus Crime Control and Safe Streets Act of 1968.**

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Rules of Procedure for the Trial of Misdemeanors, p. 975.

**UNITED STATES PAROLE COMMISSION.** See **Class Actions, 1.**

**UNLAWFUL ARRESTS.** See **Constitutional Law, VI, 2.**

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**VARIANCES FROM COMPLIANCE WITH WATER POLLUTION REGULATIONS.** See **Federal Water Pollution Control Act, 1.**

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**WARRANTLESS ARRESTS.** See **Constitutional Law, VI, 1.**

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**WHOLESALERS.** See **Antitrust Acts.**

**WINE PRICING SYSTEM.** See **Antitrust Acts.**

**WITNESSES.**

*Privileges—Criminal trial—Spouse's adverse testimony.*—Witness spouse, who alone has a privilege to refuse to testify against accused spouse in criminal case, may be neither compelled to testify nor foreclosed from testifying, and that accused's wife chose to testify against him after a grant of immunity and assurances of lenient treatment did not render her testimony involuntary, accused's claim of privilege thus being properly rejected. Trammel v. United States, p. 40.

**WORDS AND PHRASES.**

1. *"After opportunity for public hearing."* § 402 (a)(1), Federal Water Pollution Control Act, 33 U. S. C. § 1342 (a)(1). Costle v. Pacific Legal Foundation, p. 198.

2. *"Agency records."* Freedom of Information Act, 5 U. S. C. § 552 (a)(4)(B). Kissinger v. Reporters Committee, p. 136; Forsham v. Harris, p. 169.

3. *"Agency records improperly withheld."* Freedom of Information Act, 5 U. S. C. § 552 (a)(4)(B). GTE Sylvania, Inc. v. Consumers Union, p. 375.

4. *"Condemned."* 25 U. S. C. § 357. United States v. Clarke, p. 253.

5. *"Every person."* Civil Rights Act of 1871, 42 U. S. C. § 1983. Owen v. City of Independence, p. 622.

6. *"Has been convicted by a court of the United States or of a State . . . of a felony."* § 1202 (a)(1), Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. App. § 1202 (a)(1). Lewis v. United States, p. 55.

7. *"In issuing or denying any permit."* § 509 (b)(1)(F), Federal Water Pollution Control Act, 33 U. S. C. § 1369 (b)(1)(F). Crown Simpson Pulp Co. v. Costle, p. 193.

8. *"Lived with the employee . . . in a regular parent-child relationship."* Civil Service Retirement Act, 5 U. S. C. § 8341 (a)(3)(A). United States v. Clark, p. 23.

9. *"Withholding agency records."* Freedom of Information Act, 5 U. S. C. § 522 (a)(4)(B). Kissinger v. Reporters Committee, p. 136.

**WORKERS' COMPENSATION.** See **Longshoremen's and Harbor Workers' Compensation Act.**

**WORKPLACE CONDITIONS.** See **Occupational Safety and Health Act of 1970.**